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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 368.

SOUTHERN RAILWAY COMPANY,
Appellant,

vs.

A. D. WATTS, ET AL.,
Appellees.

BRIEF FOR APPELLANT.

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PRESS OF THE SUDWARTH CO., WASHINGTON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

IN EQUITY
No. 368

SOUTHERN RAILWAY COMPANY,
Appellant,

vs.

A. D. WATTS, ET AL.,
Appellees.

BRIEF FOR APPELLANT.

This is an appeal direct to this Court under Section 266 of the Judicial Code from the order of the United States District Court for the Western District of North Carolina, constituted of three judges for the hearing of the application, denying the application of Southern Railway Company for an interlocutory injunction.

Statement of the Pleadings.

1. On September 22, 1921, appellant (hereinafter called plaintiff) filed its bill in the United States District Court for the Western District of North Carolina, making as defendants thereto A. D. Watts individually and as Commissioner of Revenue of the State of North Carolina, Baxter Durham, Auditor of the State of North Carolina, Benjamin R. Lacey, Treasurer of the State of North Carolina, James S. Manning, Attorney General of the State of North Carolina, and forty-six Sheriffs of the several counties in North Carolina through which appellant operated and paid taxes, and ninety-seven Tax Collectors of the cities and towns through which appellant operated and paid taxes, and thirteen Tax Collectors of Special or Graded School Districts in which appellant operated and paid taxes. The necessity for having one hundred and sixty defendants was that the Revenue Commissioner certified the assessment complained of to the several counties, cities and school districts so soon after the fixing of the assessment as that plaintiff had not an opportunity to enjoin the certification and therefore was compelled to enjoin the tax collecting officers of the State in each tax district from collecting taxes on the assessment which had been so certified.

2. The bill filed sought to enjoin the State's taxing officers (1) from collecting property taxes upon an excessive ad valorem assessment of $96,-

306,357.00; (2) from collecting a franchise tax under a void Franchise Tax Law; (3) from collecting a franchise or privilege tax based upon an excessive assessment of $96,306,357.00.

It charged that the assessment made was in excess of true value; that the method prescribed was contrary to the statutes of North Carolina; that values outside of North Carolina were imported into North Carolina because of the method employed; that horizontal reductions in the assessed value of real property in the Counties and the declination of the Revenue Commissioner to make similar reductions in plaintiff's right of way, lands, and structures thereon discriminated against plaintiff; that plaintiff's property is assessed in excess of its true value and the property of other taxpayers habitually and customarily assessed at less than true value; that the so-called franchise tax was a property tax and not a franchise tax; that it was exacted as a privilege for engaging in interstate commerce; and was not levied in accordance with the statutes of North Carolina.

3. Plaintiff, at the time of filing its bill, made application for an interlocutory injunction under Section 266 of the Judicial Code. The District Judge entered an order fixing October 6, 1921, for hearing the application for an interlocutory injunction and directing that not less than five days' notice be given the Governor and the Attorney General of the State of North Carolina, and calling to his assistance to hear the application, Ed-

mund Waddill, Jr., United States Circuit Judge, and Henry G. Connor, United States District Judge for the Eastern District of North Carolina, and giving notice of the hearing to all defendants.

4. October 6, 1921, the Three-Judge Court assembled, defendants filed a motion to dismiss bill, which was denied. The plaintiff, by its counsel, and the defendants, through the Attorney General of North Carolina, on October 6, 1921, entered into a stipulation, which stipulation was approved by the three-judge bench and filed as a part of the record in this cause (63). The plaintiff in the stipulation agreed to pay and has paid all taxes, other than the franchise tax, as they might come due on an assessed valuation of sixty million dollars (the assessment complained of as being excessive and otherwise void being $96,306,357.00). The defendants agreed not to demand or collect or begin proceedings of any character for the nonpayment of said taxes on any valuation in excess of said sixty million dollars "until the further order of the Court or pending this action." The Court entered an order based upon the stipulation, reciting that the application for preliminary injunction had been continued by agreement of parties in order that the defendants might have time to answer and prepare their defense.

5. November 30, 1921, defendants filed their answer. The answer denied that there was an overassessment of plaintiff's property; averred that the assessment of plaintiff's property was at its

true value; denied any discrimination; averred that the assessment was made in accordance with the statutes; denied that the franchise tax was a property tax; denied that the franchise tax was assessed on any improper amount; and denied that the franchise tax was a burden upon interstate commerce. In short, it took issue with practically all material averments of the bill. Thereafter, plaintiff and defendants, within the time stipulated, filed affidavits in support of and against the application for interlocutory injunction.

6. January 24, 1922, the application for interlocutory injunction was heard by the Three-Judge Court.

7. March 18, 1922, the Three-Judge Court filed its per curiam opinion, which, without expression of reasons therefor, held that plaintiff had not made such a case as entitled it to an interlocutory injunction as prayed for and entered on the same day an order refusing and denying the injunction as prayed for. This order concluded as follows:

> "And it is further ordered that the defendants shall not proceed to enforce the collection of taxes involved in this litigation, for the period of thirty days from the date of this order, to the end that complainant may take such action in the premises as it is advised to."

8. March 31, 1922, plaintiff filed its petition for appeal and for an order staying the proceed-

ings pending appeal to the Supreme Court. This petition was continued at the request of the State, as shown by the Court's order, to April 10, 1922.

9. The appeal was granted, the stay of proceedings was denied, and petition was thereafter filed in this Court asking that the defendants be restrained pending the decision of this Court on this appeal. This Court, on May 29, 1922, denied the motion for a stay with leave to apply to the District Court for a stay until the matter could be disposed of here. Thereafter a further application was filed in the lower court for a stay and the Three-Judge Court, after hearing the matter, in July, 1922, granted a restraining order until the hearing and determination of this appeal.

Statement of the Case.

Section 3 of Article 5 of the Constitution of North Carolina* provides that taxation shall be by uniform rule and ad valorem and that all real and personal property shall be taxed according to its true value in money. Section 6 of Article 5 provides that the total of State and County taxes on property shall not exceed 15c on $100 value of property, with exceptions not material to this case, and provides that the State tax shall not exceed 5c on $100 value of property. Section 9 of Article

*For the convenience of the Court, in the Appendix hereto the Sections of the North Carolina Constitution and statutes referred to are set out in full.

7 provides that all taxes levied by any County, City, Town, or Township shall be uniform and ad valorem.

Prior to and for the year 1919, railroad property in the State of North Carolina was assessed for taxation relatively higher than other property (72).† For the year 1919, the property of appellant, Southern Railway Company, was assessed at the sum of $46,869,942.00 (9). In 1919, the Legislature of North Carolina passed the Revaluation Act (Chapter 84, Public Laws of North Carolina, 1919) (47). It was provided in this Act (Section 4), that all property, real, personal and mixed, shall be valued according to its true value in money; and that such property shall be valued as of the first day of May, 1919, and when completed shall become the value to be used for all tax purposes for the years 1920, 1921, 1922 and 1923 (47) (the assessment was subject to change by provisions, Act 1921). It was further provided (Section 31) that the State Tax Commission, which was then charged with the duty of assessing railroad property, could require of each railroad a sworn estimate, by a responsible officer of the Company, of the cost of reproduction of the properties of such Company new, including sidetracks, doubletracks, and all property owned by such Company in the State, less reasonable depreciation for such of its properties as have depreciated in value.

It was provided in Section 64 of Chapter 92 of

†Such figures in each case are to the record pages.

the Acts of 1919 that the value of the tangible property of a railroad "shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property"; that then the value of the franchise shall be determined "by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds or any other securities, the value of which is based upon the earning capacity of the property"; and that "the aggregate value of the physical or tangible property and of the franchise, as thus determined, shall be the true value of the property for ad valorem taxation."

It was provided in Section 65 of Chapter 92, Acts of 1919, that where a railroad has a part of its road in the State of North Carolina and a part in any other State, the State Tax Commission shall ascertain its value as provided in Section 64 and divide it in the proportion to the length of such main line of road in this State bears to the whole length of such main line of road, and determine the value in this State accordingly, provided the Commission shall take into consideration certain factors that would give a greater or less value per

mile of road in North Carolina than the average value for the entire system.

In response to the request of the State Tax Commission, Murray R. Hubbard, Tax Commissioner of Southern Railway Company, furnished the Commission a mass of detailed information as to the cost of reproduction of the properties of Southern Railway Company in the State of North Carolina. The information furnished was correct and accurate as to rolling stock and equipment, but as to the physical value of the property, it was stated that the information furnished was as complete as the limited time given for its preparation permitted. It subsequently developed that the values presented approximated the value given out by the Bureau of Valuation of the Interstate Commerce Commission in their tentative report, as set forth in the verified bill in this case (116). In furnishing this information the Tax Commissioner advised the Commission that it would not be possible to furnish the information asked for at any reasonable cost or at any cost within a period of several years (97, 116). The State Tax Commission declined to consider the information furnished, stating that it was worthless for the purpose furnished (97, 116).

The State Tax Commission arrived at a tentative valuation of the property of Southern Railway Company in North Carolina and of certain lines in which Southern was interested, but independently operated, namely—Atlantic & Yadkin,

High Point, Randleman, Asheboro & Southern, and Yadkin Railroad Companies, in the sum of $111,-308,325.00 (99). This sum was in fact the proportion of the investment account of the Southern Railway Company which the gross earnings of that Company within the State of North Carolina bore to the total gross earnings of the Southern Railway Company for the entire system (99). The Tax Commission did not base any estimate of value upon the market value of stocks and bonds, as required in Section 64 of Chapter 92 of the Acts of 1919, because in the opinion of the Commission a satisfactory estimate of value could not be based upon the market value of the stocks and bonds of these companies on the first day of May, 1919, for the reason that the limited market and the limited number of shares and bonds sold on the market did not furnish a fair index of the actual value of these properties as a whole, and more particularly did not furnish an index of the actual value of the properties of these companies located within the State of North Carolina (98 and 99). Nor did the Commission, as before pointed out, give consideration to the cost of reproduction as required by Section 64 of Chapter 92 of the Acts of 1919 (97). Nor did the Commission consider that the actual value of these properties could be fairly determined by their earnings, until there should be a fair return to normal conditions of operating costs, flow of traffic and stabilization of transportation rates (99), though Section 64 of Chapter 92

of the Acts of 1919 expressly require that earnings be considered.

Notice of this tentative valuation was given to the Southern Railway Company and to the other Companies and hearing was had thereon. Mr. Hubbard appeared for the Southern Railway Company and its other Companies independently operated and insisted that the Southern Railway Company's investment account was not a true index of the value of the property in North Carolina for tax purposes (116).

At this hearing Southern Railway Company proved that the net earnings for the System as a whole showed an average for the five years of 1915-1919 of $21,889,648.00, which sum capitalized at seven per centum, showed a valuation for the System of $312,709,260.00 and a valuation for North Carolina of $68,170,618.00, under the gross earnings ratio of 21.8 per cent. The Company further proved the total par value of the outstanding stocks and bonds of Southern Railway Company, the amount of gross revenue and operating expenses allocated to the State of North Carolina for the five year period 1915-1919, and also the amount of taxes paid in said State (66).

It was shown to the Tax Commission that the average annual net earnings reported to North Carolina for the five year period were $6,117,625.00, but that the operating expenses allocated to North Carolina during that period were under-

stated so that the average net earnings of $6,117,-625.00 was not a fair basis for valuation of the property in North Carolina (66). Under existing accounting methods of allocating expenses to North Carolina, operating expenses so allocated are understated and net income overstated in this: That only expenses accruing within that State are charged to State expenses, while a large volume of traffic passing through that State is assembled or originates at and is destined to terminal points without North Carolina, at which large terminal operating expenses accrue, no part of which expense is apportioned to North Carolina (10 and 11). This method of ascertaining the net income in North Carolina and using the sum so ascertained in arriving at the value of plaintiff's property works to the disadvantage of plaintiff in this: (a) the traffic which moves through the State of North Carolina, that is, has both origin and destination outside of the State, is 43 per cent of the total traffic, and, therefore, North Carolina escapes terminal expenses on a large volume of the total traffic; and (b) the terminal expenses on traffic originating or destined to North Carolina are very much less than those without the State at points like Atlanta, Birmingham, Pinners Point, Brunswick, Memphis, St. Louis, Potomac Yards, etc. (11 and 80).

The Company further proved that the annual return upon capital invested in banking, merchandise, and other enterprises in North Caro-

lina was at least 8 per cent; that no railroad securities yielding 6 per cent were at the time selling at their par value in the market; that railroads enjoying the highest credit in the country, including Southern Railway Company, were paying as much as 7½ per cent for money; and that these facts should be considered by the Commission in determining a fair percentage to use in capitalizing (66, 89, and 96).

The Tax Commission concluded to use the plan of capitalizing the net earnings in North Carolina and at first found a value arrived at by capitalizing at 7 per cent North Carolina net operating revenue for the years 1915-1919 without making deduction for taxes paid in the State of North Carolina, which, for the year 1919, amounted to more than $922,000.00. The value thus arrived at was $103,730,071.00 for Southern Railway Company and certain independently operated companies. Southern Railway Company protested so vigorously against the failure to make a deduction of the amount of taxes paid that the Tax Commission thereafter changed its plan and arrived at an assessment of $101,960,400.00 by capitalizing the average net earnings in North Carolina (99) for the five years 1915-1919, amounting to $6,117,625.00, but changed the percentage of capitalization to 6 per cent instead of 7 per cent which had been used before deducting taxes. The sum of $101,960,400.00 was apportioned as follows: Southern Railway Company, $96,605,694.00; At-

lantic & Yadkin, $4,104,710.00; High Point, Randleman, Asheboro & Southern, $688,895.00; and Yadkin, $561,114.00 (66 and 67).

The revaluation was approved by the Legislature of North Carolina (Chap. 1 Public Laws 1920) except as thereafter changed by the Legislature.

In 1920, Southern Railway Company paid taxes under protest on the assessment arrived at as aforesaid (15). The protest was made because of the illegality of the assessment made, but the tax was paid because the amount in actual taxes to be paid was not substantially different from what it was in 1919 due to the fact that no State taxes were imposed, and no reduction had been made in the assessment of other property supposed to have been revalued and brought to true value.

In 1921, the Legislature of North Carolina enacted further legislation. By Chapter 40 of Acts of 1921, the powers and duties of the State Tax Commission were transferred to and imposed upon the Commissioner of Revenue (35). Under the old system the State Tax Commission assessed the property of railroads for taxation (7 and 51), except property off the right of way assessed by local assessors, and acted also as a State Board of Equalization. After the powers and duties of the State Tax Commission were transferred to the Commissioner of Revenue, that officer became the assessing officer for railroad property, and the powers and duties of the State Tax Commission as a Board of Equalization were transferred to a State Board of

Equalization composed of the Commissioner of Revenue, the Chairman of the State Corporation Commission and the Attorney General.

Sections 64 and 65 of Chapter 92, Public Laws of 1919, were re-enacted as Sections 64 and 65 of the Machinery Act, Chapter 38, Public Laws of 1921, and contain the provisions hereinbefore referred to. In addition, Section 28(a) of the Machinery Act of 1921 provided that the board of county commissioners and county board of appraisers and review should meet jointly in each county on the first Tuesday after the first Monday in April, 1921, as a county board of review, to determine if the value of real property as heretofore appraised and assessed (that is the revaluation figure which otherwise would have lasted for years 1920, 1921, 1922 and 1923) in the county as a whole is in excess of the fair value of such property at the time of the meeting of such board. Should such boards of review find the assessed value of property to be in excess of actual value, it shall find the average percentage of such excess in the county as a whole and report its finding to the State Tax Commission (State Board of Equalization), and the values so reported shall be the values at which property shall be assessed for taxation unless and until changed and revised by the State Board of Equalization and certified to the Board of County Commissioners.

Acting under this Section, the respective county boards of review made horizontal reductions in

sixty-seven counties in the state (48), thirty-two counties through which Southern Railway Company operates, varying from 10 per cent to 50 per cent, and increased the rate of taxation in amounts varying from 10 to 84 cents per $100, and upon report of their action to the State Board of Equalization, the assessments so horizontally reduced were not revised or changed by such Board, and remain the value at which the property other than railroads is now assessed (16, 24 and 25).

Section 28(g) of the Machinery Act, 1921, provided that any taxpayer owning property assessed originally by the State Tax Commission might make application to the State Tax Commission (Commissioner of Revenue) for a review of the assessment of its property in the same manner provided for complaint by property owners before the county boards, and the State Tax Commission (Commissioner of Revenue), was given authority to hear and determine complaints. Under Section 28(b) the Board of County Commissioners was given authority to hear specific complaints of overvaluation or undervaluation of any particular tracts of real property after the general equalization order provided for in Section 28(a).

Southern Railway Company made application under Section 28(g) for a review of its assessment by the Commissioner of Revenue. The Commissioner of Revenue heard the application of plaintiff for a review of the assessment on June 21, 1921, and plaintiff showed the error of method

used by the State Tax Commission in fixing the value of its property at $96,605,694.00, that 6 per cent used for capitalization of net income was too low; that the market values of railroad securities were materially less than on May 1, 1919; that the cost of materials used generally in railroad construction was much less in 1921 than in 1920 or on May 1, 1919; and that the value of plaintiff's property in North Carolina including the value of the several roads operated independently was $68,170,-618.00 (67 and 68). The Commissioner of Revenue refused to make any reduction in the assessment of plaintiff's property, except to apply the horizontal reduction made on other property to property of plaintiff off the right of way, including non-carrier property, thereby reducing the value from $96,605,694.00 to $96,306,357.00 (38, 69).

Plaintiff gave notice to the Commissioner of Revenue of an appeal to the State Board of Equalization, but was thereafter advised by the State's officers that the law did not permit a hearing by the State Board of Equalization (9). The Commissioner, however, reheard the matter, proof was introduced on the various points above set forth to show the excessive valuation of Southern Railway Company but the Commissioner refused to reduce said assessment of $96,306,357.00 (69).

A comparison of the true value of real property in North Carolina for the six months, January 1, 1921, to June 30, 1921, inclusive, as shown in the

more than six thousand deeds recorded during that period, with the assessed value for the year 1921, of the property conveyed by such deeds, shows that the value of all property conveyed during such six months in the State of North Carolina was $30,598,475.24, while the assessed value of such property was $20,373,684.07. In other words, property other than railroad property, so far as could be determined by the method prescribed by law, was valued at only 66.58 per cent of its actual value (110-114).

The fair average market value available during the year 1921 for the outstanding securities of Southern Railway Company for owned and leased lines was $297,919,100.00. (In one of the affidavits (84) the figure was given as $287,049,221.00. The difference is due to the fact that in the latter figure certain securities were eliminated, the value not being based upon Southern Railway earnings (84)). The road mileage proportion of this figure, as required by Section 65 of Chapter 92 of Laws of 1919, and by Section 65 of the Machinery Act of 1921, would allocate to the State of North Carolina a value of $59,881,739.00 (13 and 84).

Railroad property in North Carolina, like other property, suffered from the general business depression prevailing in 1921. For the first six months of 1921, plaintiff, after paying operating expenses, taxes, hire of equipment and rents for joint facilities, lacked more than $4,500,000.00 of earning sufficient money to pay the interest on its bonded indebtedness (17 and 81).

The Interstate Commerce Commission has found the reproduction cost, less depreciation of the entire property of the Norfolk Southern Railroad in Virginia and North Carolina to be $26,028,366.00. The total mileage of Norfolk Southern is 900.543, of which 790.264 miles, or 87.754 per cent, are in North Carolina. The Commissioner of Revenue fixed the 1921 assessment of Norfolk Southern at $22,840,932.00, or 87.754 per cent of the valuation of $26,028,366.00 as found by the Interstate Commerce Commission (73).

The Bureau of Valuation of the Interstate Commerce Commission has found the tentative value of the cost of reproduction new of plaintiff's properties in North Carolina, except lands, estimating the lands. The value so found in North Carolina is $59,904,438.00 (13, 14).

The per annum standard return allowed plaintiff under the Federal Control Act of Congress as just compensation for the possession, use, control and operation of its properties by the Federal Government, divided on a mileage basis and capitalized at 6 per cent, gives a value to plaintiff's proprety in the State of North Carolina arrived at on this basis of $48,746,707.00 (15).

In 1920, Southern Railway Company paid to counties, cities, towns and separate school districts the sum of $652,900.49. In 1921, due to increase in rates, plaintiff has paid to counties, cities, towns and separate school districts on an agreed assessment of $60,000,000.00, pending the litigation, the sum of $688,163.75. There was an added sum of

$26,714.22 to be paid (116 and 117). The total taxes for 1920 were $920,367.05 (46), while for 1921 the total will be $1,243,715.97, if the $96,306,-357.00 is allowed to stand (117). The same assessment remains for the year 1922 and 1923, which brings the total amount of taxes dependent on the outcome of this case to a sum in excess of one million dollars for this plaintiff.

By Section 82 (6½) of Chapter 34, Public Laws of 1921, a franchise or privilege tax is imposed upon railroads for the privilege of exercising its franchise in the State. The basis upon which the tax is to be calculated and the extent to which every railroad company is exercising its franchise in the State of North Carolina shall be found to be the value of the property, tangible and intangible, of each railroad company in the State for ad valorem taxes. In other words, the franchise tax is calculated upon the value of the property for ad valorem taxes, and the amount of the tax is one-tenth of 1 per centum of such ad valorem value (8).

Section 82 (3½) of Chapter 34, Public Laws of 1921, provides that where "the report of any foreign corporation shows the proportion of the capital stock of such foreign corporation apportionable to this State under the rules laid down in Section 82 of this Act, to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which such report is made, the measure of the extent to which the corporate franchise of any such corpora-

tion is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation in this State" (34). The proportion of the capital stock of the Southern Railway Company is less than one-half of the total assessed value of all of its property in the State (34).

The State of North Carolina also levies an income tax of 3 per centum on the net income of this corporation as provided in the Public Laws of 1921, page 203 (9).

Assignmnt of Errors (127)

The Court erred:

(1) In decreeing that the interlocutory injunction be denied.

(2) In holding that for the purpose of the motion for an interlocutory injunction only, complainant neither in its pleadings, nor upon the proof adduced, is entitled to have the interlocutory injunction applied for.

(3) In failing to hold that the assessment of complainant's property for taxation is in excess of its "true value" in money for the purpose of taxation as required by the Constitution of North Carolina and is therefore invalid.

(4) In failing to hold that the appraisal of com-

plainant's property for taxation is not made in accordance with the provisions of the Constitution and Statutes of North Carolina, and that said appraisal and assessment of taxes are invalid and illegal.

(5) In failing to hold that the property of complainant was illegally assessed, in that the plan of valuation followed to arrive at the assessment complained of imported into the State of North Carolina values which are elsewhere, and that such plan so followed violates the Commerce Clause of the Constitution of the United States.

(6) In failing to hold that the manner and method by which complainant's property was assessed is illegal and operates as an unjust and unlawful discrimination against complainant in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and that thereby complainant is deprived of its property without due process of law and denied the equal protection of the law.

(7) In failing to hold that the action of the Commissioner of Revenue, in declining to make a reduction in the value of complainant's property commensurate with the horizontal reductions made by the taxing authorities under the North Carolina law permitting such reductions on other property generally, was unjust discrimination, contrary to the Uniformity Clause of the Constitution of North Carolina and the Fourteenth

Amendment to the Constitution of the United States.

(8) In failing to hold that the Uniformity Clause of the North Carolina Constitution and the Fourteenth Amendment to the Constitution of the United States are violated, in that complainant's property is alleged by the State to be assessed at its true value for taxation, while the property of other taxpayers generally in the State is appraised and assessed for taxation at less than its true value in money and that this appraisal and assessment of the property of other citizens and taxpayers of the State has been long continued and is arrived at under a scheme of taxation which shows intent to place an undue burden of taxation upon complainant and its property.

(9) In failing to hold that the scheme of taxation of the State of North Carolina and the assessment of the properties of the various classes of taxpayers is by settled purpose and intent so designed and carried out that, while the property of complainant is assessed at its true value in money, or more than its true value in money, the large proportion of the property in the State is assessed at less than its true value in money, thereby casting an undue and excessive burden upon complainant, in violation of the Uniformity Clause of the Constitution of the State of North Carolina and in violation of the Fourteenth Amendment to the Constitution of the United States.

(10) In failing to hold that the ad valorem

assessment being in excess of true value for taxation, the so-called Franchise tax based thereon violates the Constitution of North Carolina and the Constitution of the United States.

(11) In failing to hold that the so-called Franchise or Privilege tax is in truth and in fact an additional ad valorem or property tax upon complainant's property and is illegal and invalid because levied for the support of the State and is not levied equally upon the property of other citizens and taxpayers of the State and the enforcement of such void statute deprives complainant of its property without due process of law, contrary to the Constitution of the United States.

(12) In failing to hold that the so-called Franchise or Privilege tax is under the statute imposed as a license or privilege tax for the privilege of engaging in inter and intrastate commerce and is, therefore, a burden upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States.

(13) In failing to hold that if the Franchise or Privilege tax be imposed for the privilege of engaging in intrastate commerce, it is measured in part by the value of the privilege of engaging in interstate commerce, in that it is based upon the entire value, including values derived from use in interstate commerce, and is, therefore a burden imposed upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States.

(14) In failing to hold that if the so-called Franchise or Privilege tax is imposed for the privilege of engaging in intrastate commerce, the tax should have been assessed against complainant upon one-half of the ad valorem value, as provided in Section 82(3½) of the Revenue Act of North Carolina of 1921, and that the tax assessed against complainant upon the full value of its property is, therefore, contrary to law and void.

(15) In failing to hold that the payment of the so-called Franchise or Privilege tax is enacted as a condition precedent to the right of complainant to do "any business" in the State, whether interstate or intrastate, and, therefore, unconstitutional and void.

(16) In failing to hold that the assessment made is void, in that it includes in the value used as a basis for arrival at the Franchise or Privilege tax the value of property not used in the business for which the privilege is exacted and such law and the enforcement thereof in the manner set forth violates the Fourteenth Amendment to the Constitution of the United States.

(17) In failing to hold that the tax system of the State of North Carolina, which includes an ad valorem tax on the full value of its property in the State, including as a part thereof value it has due to its use in interstate commerce, plus a Franchise or Privilege tax upon the full value of the said property for ad valorem purposes, plus an income tax of three per cent on its net operating income, does in practical operation result in a burden upon interstate commerce and violates the Commerce Clause of the Constitution of the United States.

BRIEF OF THE ARGUMENT.

Jurisdiction.

The amount being in excess of $3,000.00, the claim of violation of rights under the Federal Constitution being in good faith, the showing being that a multiplicity of suits will result, that there is no adequate remedy at law, that unless restrained a cloud will rest upon the title to plaintiff's property, gives the Court jurisdiction.

Wallace vs. Hines, 253 U. S., 66-67.
Shaffer vs. Carter, 252 U. S., 37, 46.
Greene vs. L. & I. R. R., 244 U. S., 499, 506.
Union Pac. vs. Colorado, 247 U. S., 282, 286.

Construction of Tax Statutes.

"The general rule in reference to statutes imposing taxes is that they are to be strictly construed against the Government, and in case of any doubt as to their meaning they are to be given a liberal construction in favor of those subjected to taxation."

42 Broadway vs. Anderson, 209 Fed., 991-3.
U. S. vs. Wigglesworth, 2 Story 369.
Twine Co. vs. Worthington, 141 U. S., 468, 474.
Southern Ry. vs. North Carolina, 97 Fed., 513-18.

Ad Valorem Assessment.

1. The assessment does not follow the method prescribed by the statutes of North Carolina and the tax assessing authorities proceeded upon an erroneous taxing principle which disregarded rights secured under the State and Federal Constitution and the assessment is, therefore, illegal.

L. & N. vs. Greene, 244 U. S., 522, at p. 536.
Davis vs. Wallace, Decided U. S. Sup. Ct., Jan. 9, 1922.

The Tax Commission and the Revenue Commissioner failed to follow the tax assessing statutes of North Carolina in the following particulars:

(a) Section 64 of the Machinery Act provides that tangible and intangible property be assessed separately. This was not done.

(b) Section 64 of the Machinery Act provides that the value shall be determined by use of actual cost of replacing the property. This was not done.

(c) Section 64 of the Machinery Act provides that the value of the franchise shall be determined by due consideration of the gross earnings as compared with the operating expenses and particularly by consideration of the value placed upon the whole property by the public as evidenced by the market value of all capital stock, certificates of indebtedness, etc. The assessing officers declined

to consider the market value of the capital stock, etc.

(d) Section 64 of the Machinery Act requires that the aggregate value of the physical property and of the franchise, determined as above stated, shall be the true value of the property for ad valorem taxation. Instead of arriving at true value in the method prescribed, the Tax Commission arrived at a value by capitalizing at 6 per cent the net return from State and interstate commerce in North Carolina. This is contrary to the statute.

(e) Section 65 of the Machinery Act provides that the Commission shall ascertain the total value of a railroad operating in several States and divide that value in the proportion that the length of such main line in North Carolina bears to the total length. This was not done.

2. The assessment of $96,306,357.00 is in excess of the true value in money of said property for tax purposes as the same is defined under the North Carolina Constitution and laws and violates the Uniformity Clause of the North Carolina Constitution and the Due Process of Law Clause of the United States Constitution.

(a) If net earnings were to be used as one element only of value, the net of this railroad operating in several States which should have been capitalized was the average net for years 1915-19

of $21,889,648.00, which sum, capitalized at 7 per cent and divided on a gross earnings basis, showed a value for North Carolina of $68,170,613.00. Capitalized at 6 per cent, showed a value of $79,532,-387.00. The net for the entire company for the five years 1916-1920 was $21,274,027.00. These earnings capitalized at 6 per cent divided on a mileage basis give to North Carolina a value of $71,267,994.00. Capitalized on a 7 per cent rate, $61,086,851.00. Capitalized on an 8 per cent basis, gives to North Carolina $53,460,995.00.

(b) The reproduction cost data should have been used. That data showed a value approximating sixty million dollars.

(c) The value arrived at on a road mileage proportion of the fair average market value of all Southern Railway securities for a series of years allocated to North Carolina a value of $59,881,-739.00.

(d) Capitalized at 6 per cent, the standard return allowed plaintiff under the Federal Control Act of Congress and divided on a mileage basis gives a value in North Carolina of $48,746,707.00.

(e) The tentative value of the Interstate Commerce Commission of plaintiff's property in North Carolina, with the estimated value of the land, gives to North Carolina a total of $59,904,438.00.

3. Rate at which net should be capitalized.

The rate at which the net should be capitalized,

if that method of determining value be adopted, is not fixed. It depends upon time, circumstances, and locality. It should be such rate as is accepted and usually realized upon investments in business in that locaity. Under the proof in this case the rate of capitalization should have been 8 per cent.

Lincoln Gas Co. vs. Lincoln, 250 U. S., 256, at 267.
Chicago, etc., Co. vs. State Board of Equalization, 114 Fed., 557, at 561.
San Diego Water Co. vs. City of San Diego, 118 Cal., 556.
Consolidated Gas Case, 157 Fed., 849, 870.
Consolidated Gas Case, 212 U. S. 19, 48.
Pioneer T. & T. Co. vs. Westenhaver, 29 Okla., 118 Pac. 354.

4. If excessive earnings are capitalized, it is an importation of value, contrary to law, to the same extent as if a total value is arrived at by stock and bond method and divided on a mileage basis, without deducting a large amount of personal property outside of the State or especially valuable terminals, etc.

Fargo vs. Hart, 193 U. S., 490.
Union Transit Co. vs. Kentucky, 199 U. S., 194.

Illegality of Assessment Due to Non-uniformity and Discrimination.

The County Boards of Review of thirty-two counties through which plaintiff operates made

certain horizontal reductions in the assessed value in said counties as a whole of real property. The Commissioner of Revenue declined to give to plaintiff similar horizontal reductions in plaintiff's right of way, lands, and structures thereon, situated in said counties. This declination on the part of the Commissioner of Revenue violates Section 3 of Article 5 of the Constitution of North Carolina and violates the Fourteenth Amendment to the Constitution of the United States. It is an illegal discrimination.

The Uniformity Clause of the North Carolina Constitution and the Fourteenth Amendment to the Federal Constitution have been violated, in that, while plaintiff's property is alleged by the State to be assessed at its true value for tax purposes, the property of other taxpayers generally in the State is habitually, customarily, and systematically assessed for tax purposes at less than true value.

The affidavits of plaintiff in this case compare the deed value of all deeds recorded for the six months, January 1st to June 30th, 1921, (more than six thousand in number) with the 1921 assessment of the same property, which shows that the assessed value in the State is 67 per cent of the actual or deed value. The State averred in its answer that its assessment of plaintiff's property was the true, actual value thereof.

Greene vs. L. & I. R. R. Co., 244 U. S., 499, 514-16.

Taylor vs. L. & N. R. R. Co., 88 Fed., 350, 364-71.

C. M. & St. P. vs. Kendall, 278 F. R., 298.

The discrimination by an undervaluation of other property and an overvaluation of plaintiff's property has been intentional and systematic and violates the Constitution of the United States and of North Carolina.

Sundaylake Iron Co. vs. Wakefield, 247 U. S., 350-2.

Raymond vs. Chicago, etc., 207 U. S., 20, 35-6.

Discrimination Among Members of the Same Class.

Different methods were employed in valuation of different members of the railroad class which results in unlawful discrimination to plaintiff's harm. The reproduction cost of certain railroads was used while plaintiff's value was ascertained by capitalization of net earnings.

Raymond vs. Chicago, etc., Co., 207 U. S., 20, 36.

Franchise Tax.

Neither State Courts nor Legislatures can by giving a tax a particular name make of it a tax

different from that which its real nature and effect compels.

Choctaw vs. Harrison, 235 U. S., 292.
Galveston vs. Texas, 210 U. S., 217, 227.

The Courts regard substance rather than form and the controlling test is in the operation and effect of the statute as applied.

St. L. & S. W. vs. Arkansas, 235 U. S., 350, 362.
Crew Levick Co. vs. Pennsylvania, 245 U. S., 292.

1. The so-called franchise tax is not a franchise tax, but is in fact an ad valorem or property tax. Since it is an ad valorem tax, it is void because not levied equally upon all property holders in the State, and is, therefore, contrary to Section 3 of Article 5 of the Constitution of North Carolina, and by reason of the enforcement thereof, plaintiff is deprived of the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

2. The so-called franchise tax is a property tax and void.

A tax such as this, based on the value of the property and not upon the amount of business transacted, is a property tax and not a franchise or privilege tax.

Worth vs. Railroad, 89 N. C., 301.

Provident Institution vs. Massachusetts, 6 Wall., 611, at 630, 631.

State vs. Stonewall Insurance Co., 39 Ala. 335.

Tremont vs. Lowell, 59 N. E., 1007.

C. & E. I. vs. State, 51 N. E., 924.

People vs. Knight, 174 N. Y., 475, 67 N. E., 65.

This tax is void because it is assessed on the entire value for ad valorem tax purposes of all of plaintiff's property in the State. Plaintiff has non-carrier property and the tax based upon a value any part of which consists of property not used in the business is not a valid franchise tax.

3. The amount of the franchise tax is double what it should be under Section 82(3½) of the North Carolina Revenue Law, which provides that where the proportion of the capital stock of a foreign corporation (Southern Railway is a foreign corporation) is less than half of the assessed value for taxation of all property of such company in the State, the franchise tax is to be paid upon half of the assessed value. The plaintiff's capital stock apportioned to North Carolina is less than half of the assessed value.

4. If the tax levied under Section 82(6½) is a franchise tax, it is invalid in that it is a burden upon interstate commerce.

The franchise tax of North Carolina is based upon the total ad valorem value. That value is

arrived at under the North Carolina statutes by valuing property employed in both intrastate and interstate commerce, which is permissible, and by including in the value of such property the value of its use derived from being used in both intrastate and interstate commerce, which is permissible in arriving at the value of physical property in North Carolina for ad valorem tax purposes, but since the State can not tax interstate commerce, or levy a tax for the doing of interstate commerce, it can not accomplish that indirectly by basing a franchise tax upon a total value of property, which value is in part derived from interstate commerce. In this case the value was fixed by the tax authorities by capitalizing net earnings derived from state and interstate commerce and a franchise tax based thereon violates the commerce clause of the Federal Constitution.

Atlantic, etc., Telephone Co. vs. Philadelphia, 190 U. S., 160, 162, 163.

Wells Fargo vs. Nevada, 248 U. S., 165, 167.

Adams Express Co. vs. Ohio, 165 U. S., 194, 220.

Harrisburg vs. Texas, 210 U. S., 217, 225, 249.

Kansas City Ry. vs. Kansas, 240 U. S., 227, 231.

Postal Telegraph & Cable Co. vs. Adams, 155 U. S., 688, 695.

Western Union vs. Kansas, 216 U. S., 1, 26.

In the case of *St. L. & S. W. Ry. vs. Arkansas,* 235 U. S., 350, the Court, at p. 363, said:

> "The tax, as will be observed, is not in anywise based upon the receipts of the railway company from interstate commerce, either taken alone or in connection with receipts from its intrastate business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or the value of the business done, we are relieved from those difficulties that arise where said taxes are based upon the earnings of interstate carriers."

5. The franchise tax law is invalid in that it imposed a condition upon the right of this foreign corporation engaged in interstate commerce to transact interstate commerce. The North Carolina franchise law levies a franchise tax upon every railroad company doing business in the State.

Under Section 82(17) the punishment for failure to pay is that "the Secretary of State shall thereupon cancel the certificate of authority of any such foreign corporation to do business in the state." Again, in Section 82(20), the Attorney General is directed to secure an injunction "to restrain such public utility or corporation from the transaction of *any* business in this State until the payment of such taxes." The foregoing language of the Act and the enforcement Sections make it clear that the tax is levied for the privilege of doing any business, which includes doing of interstate business, and that is not constitutional.

The payment of the tax is made a condition precedent to doing any business.

Ludwig vs. Western Union, 216 U. S., 146, at 156.

I. C. vs. Railroad Commission, 229 Fed., 248, at 255.

Underwood Typewriter Co. vs. Chamberlain, 254 U. S., 113, at 119.

St. L. & S. W. vs. Arkansas, 235 U. S., 350, at 368.

ARGUMENT.

Jurisdiction.

The bill states the amount involved is in excess of three thousand dollars; it further shows that the tax is assessed in violation of the Fourteenth Amendment to the Constitution and in violation of the Commerce Clause of the Constitution; it further shows that unless the collection of the tax is enjoined a multiplicity of suits will result; it further shows that there is no adequate remedy at law and that unless the collection of the tax is restrained a cloud will rest upon the title of all plaintiff's property. These allegations are made in good faith and, under the decisions, give the Court jurisdiction.

The case of *Wallace vs. Hines* was an appeal from the order of the three judges restraining the

defendants from taking steps to enforce taxes imposed by an Act of North Dakota. The Court said:

> "The defendants are the State Tax Commissioner, the State Treasurer, the State Auditor, the Attorney General and the Secretary of State for North Dakota. As the tax is made a first lien upon all the property of the plaintiff railroads in the State and thus puts a cloud upon their title, and as delay in payment is visited with considerable penalties, there is jurisdiction in equity unless there is an adequate remedy at law against the State, to which the tax is to be paid."
>
> *Wallace vs. Hines,* 253 U. S., 66, 67.

The case of *Shaffer vs. Carter* was a suit in equity to restrain the enforcement of a tax assessed under the Income Tax Law of Oklahoma. The Court said:

> "As ground for resorting to equity, the bill alleges that plaintiff is the owner of various oil and gas mining leases covering lands in Creek County, Oklahoma, and that the lien assessed thereon by virtue of the levy and tax warrant creates a cloud upon his title. This entitles him to bring suit in equity (citing many cases), unless the contention that he has a plain, adequate and complete remedy at law be well founded."

Shaffer vs. Carter, 252 U. S., 37, 46.

The case of *Greene vs. L. & I. R. R.,* was one in which a bill was filed against the State Board of Valuation of Kentucky and against the Attorney General to restrain the collection of franchise taxes. There was no diversity of citizenship. The suit arose under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. It was alleged that the illegal valuation constituted a cloud upon plaintiff's property. There was a demurrer filed to the effect that no Federal question was involved and that it was a suit against the State. The Court said:

> "(1) It is convenient to state at this point what, indeed, is not controverted, that, if the suits be otherwise maintainable, the last-mentioned averments of the bills show sufficient special grounds for invoking the equity jurisdiction, under the rule established by repeated decisions of this Court. Dows vs. City of Chicago, 11 Wall. 108, 110, 112; Hannewinkle v. Georgetown, 15 Wall. 547; Union Pacific Railway vs. Cheyenne, 113 U. S., 516, 525, 526; Ohio Tax Cases, 232 U. S. 576, 587."

Greene vs. L. & I. R. R., 244 U. S., 499, 506.

> "Equity has jurisdiction to enjoin the collection of illegally discriminatory taxes, where the existence of an adequate and complete remedy at law is doubtful.
>
> "Where the legal remedy by paying the taxes and suing to recover back necessitates

separate actions against several school districts and towns, it will not displace the equitable remedy by injunction in one suit."

Union Pac. vs. Colorado, 247 U. S., 282, 286.

The contention that plaintiff may pay and sue to recover is not an adequate remedy at law.

King vs. Northern Pacific, 196 Fed., 323.

Where a person is entitled to litigate in a Federal Court, it is not an adequate remedy at law to be invited into a State Court by his antagonist to adjudicate his rights.

U. S. Life Ins. Co. vs. Cable, 98 Fed., 761.

A State cannot tie up a citizen of another State, for property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.

Smyth vs. Ames, 169 U. S., 466.

Section 7979 of the Consolidated Statutes of North Carolina permits an injunction if a tax be illegal or invalid or be levied or assessed for an illegal or unauthorized purpose.

The Supreme Court of North Carolina holds that the effect of the above section is to give an additional remedy to test the validity of a tax, leaving it to the discretion of the taxpayer to pay the tax and sue to recover it back, or to proceed by injunction.

Range Co. vs. Carver, 18 N. C., 328.
Purnell vs. Page, 133 N. C., 125.

The defendants in their answer (52) set out the following:

> "* * * that, as hereinbefore stated, the said Commissioner of Revenue did decline to reduce said values, and if the plaintiff felt itself aggrieved by the action of the Commissioner in this particular, then it was competent for the plaintiff by application to the Court for a writ of certiorari to have had the action of the Commissioner of Revenue in this manner reviewed by the courts of the State, and its grievances, if any, redressed."

This is the only averment which suggests that plaintiff had an adequate remedy at law, and that remedy is averred to be by means of a writ of certiorari to have the action of the Commissioner of Revenue reviewed. Certiorari is not an adequate remedy at law so as to defeat the jurisdiction of the Federal Court in equity, as held in *Borden's Condensed Milk Co. vs. Baker,* 177 Fed. (C. C. A. 4th Circuit) 906. The decision of the Court on this point is set forth in the third headnote as follows:

> "Since a writ of certiorari will not issue out of a Federal Court, except in aid of such court's jurisdiction, and is not available to review and annul an alleged invalid municipal ordinance, the fact that under the state practice such a writ had been available for that purpose since 1789 did not afford complainant an adequate remedy at law, precluding it from maintaining a suit to restrain the enforcement of such ordinance in the Federal Court, though it had previously instituted certiorari proceedings in the State Court to the same end."

Construction of Tax Statutes.

"The general rule in reference to statutes imposing taxes is that they are to be strictly construed against the Government, and in case of any doubt as to their meaning they are to be given a liberal construction in favor of those subjected to taxation."

42 Broadway vs. Anderson, 209 Fed. 991-3.

Judge Simonton, in *Southern Ry. vs. North Carolina,* 97 Federal Reporter, stated the rule as follows:

"It must be borne in mind that the legislation now under discussion is not remedial legislation. In all such cases courts labor to arrive at the beneficent intent of the legislature and seek to secure it full effect. Com. vs. Kimball, 24 Pick. 370, and cases collected in 23 Am. & Eng. Enc. Law, 309, 362, and 24 Am. & Eng. Enc. Law, 358. We are construing statutes imposing taxes and burdens on the taxpayer. In all such the rule is changed. 'The highest power that a sovereign—the law-making power—can confer is the power to tax; and every act conferring that power must express it plainly, and the act so expressing it must be strictly construed.' Suth. St. Const. 459 et seq. In every case of doubt, such a statute is construed against the government. U. S. vs. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16690.

"Says Lord Chancellor Cairns in Partington vs. Attorney General, L. R. 4 H. L. 100, 122:

"'As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an "equitable construction," certainly such a construction is not admissible in a taxing statute when you can simply adhere to the words of the statute.'

"See, also, U. S. vs. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16690; Twine Co. vs. Worthington, 141 U. S. 474, 12 Sup. Ct. 55; Rice vs. U. S., 4 C. C. A. 104, 53 Fed. 910."

Southern Ry. vs. North Carolina, 97 Fed., 513-18.

Ad Valorem Assessment.

The following are the grounds upon which the ad valorem assessment is claimed to be illegal:

(1) The Tax Commission, in making the assessment, and the Commissioner of Revenue, in refusing to change it, failed and refused to follow the method prescribe by the statutes of North Carolina for the assessment of railroads, proceeded upon an erroneous taxing

principle, and followed an arbitrary illegal plan, and the assessment is, therefore, invalid.

Section 64 of the Machinery Act, as set forth in the Appendix hereto, reads in part as follows:

"SEC. 64. *Tangible and intangible property assessed separately.*

"(a) At such dates as real estate is required to be assessed for taxation, the said commission shall first determine the value of the tangible property of each division or branch of such railroad of rolling stock and all other physical or tangible property. This value *shall* be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property.

"(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

"(c) The aggregate value of the physical or tangible property and the franchise as thus determined, shall be the true value of the

property for the purpose of an ad valorem taxation, and shall be apportioned in the same proportion that the length of such road in each county bears to the entire length of such division or branch thereof."

Section 65 of the Machinery Act reads in part as follows:

"SEC. 65. *Railroads.*

"When any railroad has part of its road in this State and part thereof in any other State, the said commission shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the State Tax Commission of such company as provided in the next preceding section, and divide it in the proportion to the length such main line of road in this State bears to the whole length of such main line of road, and determine the value in this State accordingly: *Provided,* the commission shall, in valuing the fixed property in this State, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State than the average value for the entire system."

In *L. & N. R. R. vs. Greene,* 244 U. S., 522, this Court considered an appeal of a suit by the Railroad Company against the Board of Valuation and Assessment of Kentucky seeking to restrain the taking of any steps toward enforcing taxes upon

the basis of a certain assessment which was alleged to be unlawful and excessive and that the Board of Valuation proceeded upon erroneous principles. This Court, at p. 536, said:

> "The findings of an official body such as the Board of Valuation and Assessment, made—as was the case here—after a hearing and upon notice to the taxpayer, are quasi-judicial in their character, and are not to be set aside or disregarded by the courts unless it is made to appear that the body proceeded upon an erroneous principle or adopted an improper mode of estimating the value of the franchise, or unless fraud appears. *Pittsburg, etc., Ry. Co. vs. Backus,* 154 U. S., 421, 435-436; *Chicago, Burlington & Quincy Ry. Co. vs. Babcock,* 204 U. S., 585, 596. In this case there is no showing of fraud, the contention being that the Board departed from the mode prescribed by the statute. If they did this, or if they proceeded in disregard of rights secured to the taxpayer by the State or Federal Constitution, of course they proceeded upon an erroneous principle."

This Court, in the case of *Davis, Director General, vs. Wallace,* decided January 9, 1922, had under review the question of enjoining the collection of a special excise tax levied by the State of North Dakota. That part of the North Dakota statute pertinent to the point now made against the North Carolina statute was a proviso that in the case of a railroad having lines that enter into,

extend out of, or cross the State, the property within the State should be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State. Attention is directed to the similarity of the Section just referred to and Sec. 65 of the Machinery Act of North Carolina, *supra*.

This Court said:

> "The first of the objections made to the tax is that it was assessed on a basis which the statute does not authorize or sanction. Of course, if this be so the tax must fall, and the other objections need not be considered. The statute does not prescribe a single or unvarying basis whereon the tax shall be assessed, but designates several bases and defines the particular situation in which each shall be applied. Where the business of the corporation is wholly within the State the tax is to be computed according to the "capital actually invested" in the business. Where the business is partly within and partly without the State the computation is to be based on a proportion of the company's 'entire stock and bond issues,' which is to be taken as representing the 'investment within the State.' But the proportion is to be determined by standards which vary materially. In one situation it is to conform to the ratio of the company's business within the State to its total business, and in another to the ratio of the company's property employed in its business within the State to its entire

property employed in its business wherever conducted. In the instance of railroad companies and other public utility corporations having lines partly within and partly without the State the statute specially provides that it shall conform to the ratio of the company's mileage within the State to its entire mileage.

* * * * * * * * * * *

"This provision shows that the legislature intended by it to put the corporations which it describes in a separate class for the purposes of the tax, to require as to them that the tax be computed and assessed on the special basis there prescribed, and to exempt them from the bases applicable to other corporations. That intention hardly could have been more clearly expressed."

The Court held:

"From what has been said it follows that to sustain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specially prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which these railroad companies belong. Of course we cannot so hold."

Whatever latitude may have been allowed the taxing board, we state this to be a fundamental in order that the assessment of a railroad which runs from North Carolina into another State may be constitutionally assessed, namely, that the

total value should have been arrived at and the North Carolina proportion thereof be ascertained on the basis of the North Carolina mileage to the total mileage. This was not done, as we will show. One of the objections made to the capitalization of the North Carolina earnings, State and interstate, is based on the fact that the Tax Commission failed and refused to arrive at a value by capitalizing the entire net, within and without the State, and divide it on a mileage basis. If the statute had been followed, this objection would not have arisen. The reason for having such a provision in the law is in order to prevent the very condition with which we are now confronted because the taxing authorities assumed an authority not given them under the law.

We contend that the Board followed an erroneous principle. Necessarily if the assessing officer departed from the method prescribed in the statute he proceeded upon an erroneous principle.

The record shows that plaintiff furnished the Commission as complete a statement of cost of reproduction as possible. Plaintiff's testimony on this is:

> "That he, as representing Southern Railway Company, furnished to the Commission, in response to its demand, a mass of detailed information as to the cost of reproduction of the properties of his Company in the State of North Carolina; said statements were correct and accurate as to the rolling stock and

equipment. It was stated that as to the physical value of the property, other than rolling stock, that was as complete as the limited time given Southern Railway within which to prepare the same permitted. He is able to set out at this time that the values presented in said accounts approximated the values now given out by the Bureau of Valuation of the Interstate Commerce Commission in their tentative report, as set forth in the bill filed in this case; that upon filing the same the Tax Commission declined to consider it, stating that it was worthless for the purpose furnished." (116)

The three members of the Tax Commission which fixed the assessment said on this point:

"The Southern Railway Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway Company and the Norfolk-Southern Railroad Company, in response to demands made upon them for specific and detailed information as to the cost of reproduction of the properties in this State of each of these companies, did file with the State Tax Commission certain sets of figures, now on file with the Commissioner of Revenue, but did not pretend that such figures even approximated the cost of reproduction of the properties owned by these companies, or either of them, in this State, in the year 1919, but, on the other hand, insisted that it would not be possible for them to furnish this information at any reasonable cost or at any cost within a period of several years. The State Tax Commission, therefore, did not have

the benefit of this specific detailed information with respect to the value of the particular properties in this State of these several railroad companies which it did have with respect to, and used in, the valuation of properties of industrial enterprises within the State, and of necessity had to form its valuation of the properties of these companies without having this information and by making the best use that it could of other information furnished by these companies on file with and in the records of the North Carolina Corporation Commission." (97)

According to their own statement, they disregarded the data as to reproduction cost of the property.

The plaintiff proved the par value of the stocks and bonds and other securities as shown by the following testimony:

"Affiant also proved the total par value of the outstanding stocks and bonds of Southern Railway Company and offered to agree with said Tax Commission upon the fair market value of said stocks and bonds, if the Commission should desire to make the assessment under that plan." (66)

The Tax Commission testified as to this evidence of value:

"A satisfactory estimate of value could not be made based upon the market value of the stocks and bonds of these companies on

the first day of May, 1919, for the reason that the limited market and the limited number of shares and bonds sold on the market did not furnish, in our judgment, a fair index of the actual value of these properties as a whole, and more particularly did not furnish an index of the actual value of the properties of these companies located within the State of North Carolina for the reasons hereinbefore stated." (98, 99)

Instead of using the elements as above set forth, as directed by the statute, the Tax Commission testified as to the manner it employed in arriving at the value of plaintiff's property, as follows:

"As to the properties of the Southern Railway Company in the State of North Carolina, a valuation of $111,308,325 was made, which was in fact the proportion of the investment account of the Southern Railway Company which the gross earnings of that company within the State of North Carolina bore to the total gross earnings of the Southern Railway Company for the entire system. Upon hearing and review of this valuation, after notice to the Southern Railway Company, it was reduced to $101,960,416, which was in fact the amount which the average net earnings of the Southern Railway Company within the State of North Carolina for the preceding five years, capitalized upon a basis or theory of six per cent, would have produced." (99)

Plaintiff's tax officer testified that he insisted orally and in brief before the State Tax Commission, and again before the Commissioner of Revenue, that the Southern Railway Company's investment account was not a true index of the value of its property in North Carolina for tax purposes and that he was the only person who submitted any facts on behalf of plaintiff before the Tax Commission (116).

The uncontradicted evidence is that the investment account included in the total material and supplies which were on hand at the time the investment account was rendered in July, 1920, but were not on hand in May, 1921, and that the investment account was not by any one allocated to the State of North Carolina (77).

As will have been noted from Section 64 of the Machinery Act, above set forth, the tangible and intangible property is by the law of North Carolina directed to be assessed separately. This was not done. As will have been noted, Section 65 provides that where a railroad has part of its road in North Carolina and part in other States, the Commission *shall* ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the State Tax Commission, as provided in Section 64, "and divided in the proportion to the length such main line of road in this State bears to the whole length of such main line of road and determine the value in this State accordingly," provided the Commission may consider the difference in value of the part of road in

North Carolina as compared to the other parts of the road. This was not done.

It is indisputable, therefore, that the assessing officers departed from the method prescribed by law for the revaluation of railroad property. It used a single element of value in arriving at the assessment, namely, capitalization of earnings, and it disregarded altogether, for one reason or another, the other elements laid down in the statute. There was no authority in the law for so doing. This is admitted in the answer (43). The law said that the tangible value "shall be determined by a due consideration of the actual cost of replacing the property," etc. This was not done. The law says in arriving at the franchise value, that value "shall be determined by due consideration of the gross earnings as compared to the operating expenses, and *particularly* by consideration of the value placed on the whole property by the public (the value of the physical property being deducted) as evidenced by the market value of all capital stock," etc. This was not done. The State recognizes the predicament in which it is and says that it gave consideration to the other elements provided by the statute in addition to capitalization of earnings. This is not borne out by the testimony of the three individuals who fixed the assessment, and inasmuch as the assessment is the exact amount of the capitalized earnings and inasmuch as the other elements showed a value of many millions less, the plaintiff received no benefit from

the consideration, if any was given, and it was and is entitled to the benefit thereof.

(2) The assessment of $96,306,357.00 is in excess of the true value in money of said property for tax purposes as the same is defined under the North Carolina Consttution and laws and violates the Uniformity Clause of the North Carolina Constitution and the Due Process of Law Clause of the United States Constitution.

Section 3 of Article 5 of the Constitution provides that all real and personal property shall be taxed at its true value in money. If the assessment is in excess of true value it violates the North Carolina Constitution and to enforce it would deprive plaintiff of its property without due process of law, contrary to the Federal Constitution. The assessment complained of is $96,306,357.00, being the same as 1920 except for minor changes in local property lying off the right of way.

It was shown the Tax Commission in 1920 that the net earnings of the Southern Railway Company showed an average for the first five years 1915-1919 of $21,889,648.00, which sum capitalized at 7 per cent showed a valuation for the system of $312,709,260.00 and a valuation for North Carolina of $68,170,618.00, under the gross earnings ratio of 21.80 per cent (66), or, capitalized at 6 per cent and divided on the gross earnings basis, would yield a value of $79,532,387.00. It was

shown the Tax Commission that the annual net earnings for North Carolina were $6,117,625.00, but it was shown in connection therewith that this was not the true net, because the operating expenses for North Carolina were understated (66). The facts showing the understatement of expenses in North Carolina are set forth in the affidavit of J. B. Duke (79, 80, 81) and in the affidavit of A. H. Plant (75, 76). The foregoing facts were also shown the Revenue Commissioner in 1921 and he was shown that the average net for the Southern Railway Company for the five years 1916-1920 was $21,274,027.00, and that these earnings capitalized at 6 per cent and divided to North Carolina on a road mileage basis would give to North Carolina a value of $71,267,-994.00. Capitalization on a 7 per cent rate and divided on a road mileage basis would give to North Carolina $61,086,851.00. Capitalization on an 8 per cent rate and divided to North Carolina on a road mileage basis would give to North Carolina $53,460,995.00 (12).

The reproduction cost data, as complete as the time allowed would permit, was furnished the Tax Commission. That data approximated the tentative values later given out by the Bureau of Valuation of the Interstate Commerce Commission (116).

It was shown the Court that the Bureau of Valuation of the Interstate Commerce Commission had found a tentative value of the cost of reproduction of plaintiff's properties in North Carolina. This

reproduction cost, with a mileage proportion of the rolling stock and estimated value of the land, gave a total value of $59,904,438.00 (13, 14).

It was shown to the Tax Commission and to the Commissioner of Revenue that taking the fair average market price of all Southern Railway securities for a series of years amounted to $287,049,221.00. The road mileage proportion of this figure, as required by Section 65, would allocate to the State of North Carolina the value of $59,881,739.00 (13, 84).

It was shown to the Commissioner of Revenue that capitalizing the standard return allowed plaintiff under the Federal Control Act of Congress at 6 per cent and dividing on the mileage basis would give a value to plaintiff's property in North Carolina of $48,746,707.00 (15).

The foregoing elements of value other than the standard return are prescribed by the law to be used and each of them, other than the standard return, is upheld in decisions of this Court as a recognized test of ascertainment of value of a railroad.

The law requires that the value of the franchise be arrived at by due consideration of capitalization of earnings and by particular consideration of the value placed on the property by the public, evidenced by market value of its securities; from such value the value of the tangible property is to be deducted, and the remainder is the franchise value. Applying that rule, we find that the total value is somewhere between the $71,000,000.00

capitalization of earnings (or $53,000,000.00 if eight per cent is the rate used) and $45,000,000.00, the value by the stock and bond method. The mean between the two values would be $58,500,000.00, and since the replacement value is in excess thereof, there was no intangible or franchise value as of May 1, 1921, which accords with the operating results of the first six months of 1921, and therefore the total ad valorem value as of May 1, 1921, was $60,000,000.00.

The plaintiff prayed (20) that the Commissioner of Revenue state in his answer the method whereby he reached the final assessment. The Commissioner of Revenue, responding in his answer to the interrogatory, denies that the State Tax Commission used the capitalization of plaintiff's net income for North Carolina exclusively in arriving at the said assessment. He says further that the Tax Commission followed Sections 64 and 65 of the Machinery Act. He further says that by an application of the method set forth in Sections 64 and 65, other than the income method and the stock and bond method, the Tax Commission arrived at a figure in excess of one hundred million dollars, and that consideration of the capitalization of net income and consideration of the market value of the stocks and bonds reduced the tax to ninety-six million dollars.

We appreciate that we can not inquire into the operation of the minds of the Tax Board, but we have the right to be advised sufficiently of the

method pursued to intelligently determine if the law has been followed.

As said in the case of *Long Dock Co. vs. State Board of Assessors,* from the highest court of New Jersey, 92 Atlantic 439, at pages 441-2:

> "The mental process by which the board makes its inferences and reaches its conclusions is no more open to inquiry than the processes by which a jury reaches its verdict (Chicago, B. & Q. Ry. Co. vs. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636), but the evidential facts on which the finding and judgment of the board rests are as open to inquiry as the facts proved before a jury, and none the less open in the one case than in the other, because those facts are within the knowledge of members of the board alone or in the knowledge of jurymen alone."
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> * * * * * * * * * * *
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> "It is not consistent with the methods of judicial tribunals, nor of special tribunals seeking to do justice, to give the taxpayer no chance to know what the case made against him may be."

We can not see what objection the tax authorities would have to advising the taxpayer the method used and the results in dollars and cents, so that it may be fairly determined whether the assessment is the value of the property for tax purposes. Inasmuch as the method alleged by the Railway to have been used produces the exact figure at which the property was assessed, we think that, notwithstanding the categorical de-

nial, the record before the Court and the admission of the taxing board (99 and 72) show that the method which the plaintiff claims was used is the one which was in fact used.

A number of methods for determining the value of a railroad have at one time or another been approved by the Courts. The determination of the value of a railroad is not easy. The method pursued in any case is only a means to the end of arriving at true value, and it must follow that no matter how perfect the plan may be as a plan, still if the result of following it is an over-assessment in a particular case, the plan should not have been followed in that case.

In this case the result is that the assessment is in excess of its true value.

Rate at Which Net Should Be Capitalized

(3) The State capitalized the net earnings at 6 per cent which was not the proper rate at which to capitalize, and the result was a value in excess of the true value.

To arrive at a correct result when using the plan of capitalization of net earnings, the correctness of the rate at which the net is capitalized is as important as using a correct net figure to capitalize. It is true that in the past in many rate cases and in a few tax cases capitalization at six per cent has been upheld. Why six per cent any

more than four per cent? Was it not because at that time a yield of six per cent was thought to be all that was requisite to induce investors to invest their money in such enterprises? If not that, it may have been because investments in business generally in that community yielded no more than six per cent. If these be the reasons and if the premise upon which they are based is contrary to the evidence in this case, then we submit the rate of six per cent is wrong and the correct rate is eight per cent. The unforeseen contingencies, the periodical disasters attendant upon railroad property such as storms and floods, the hazards of the business, the lean years are all to be considered in granting to railway invested capital a higher rate of return than the rate fixed by law for a first mortgage lien. What is a reasonable return in any event is governed by two prime considerations: Safety or regularity, and what money invested in other property will yield.

> "An important circumstance will always be the rate of interest at which money can be borrowed for investment in such a business; and, where the business appears to be honestly and prudently conducted, the rate which the company would be compelled to pay for borrowed money will furnish a safe, though not always conclusive, criterion of the rate of profit which will be deemed reasonable."

San Diego Water Co. vs. City of San Diego,
118 Cal. 556, 50 Pac. 633.

District Judge Hough, in discussing the return and what a prudent business man would do, said:

> "He would expect, and have just and reasonable right to expect, a return of six per cent, not because that happens to be the interest rate by law established in the State of New York, but because it is the return ordinarily sought and obtained on investments of that degree of safety in the City of New York."

Con. Gas Case, 157 Fed. 849, 870.
Pioneer Tel. & Tel. Co. vs. Westenhaver, 29 Okla., 118 Pac. 354.

What is a reasonable return in any case upon the property invested is determined in a great measure by the character of the investment and the amount thereof, and the return other investments of similar character and amount in the same community yield and the prevailing rate of interest.

Justice Peckham, in the *Consolidated Gas Case,* 212 U. S. 19, 48, said:

> "There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon in-

vestments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference than can be obtained from an investment in Government bonds or other perfectly safe security."

In *Chicago, etc., Co. vs. State Board of Equalization,* 114 Fed. 557, at 561, the Court said:

"Several other elements in a fair calculation, based on net earnings, have raised questions to which we have given careful consideration. The first of these is upon what rate of the true net earnings the aggregate value of the property should be capitalized. We have fixed the rate at six per cent."

* * * * * * * * * * *

"* * * for no investor feels secure of a dividend at six per cent next year, simply because the company has earned it this. It is probably fair to say that net earnings, accruing through several years, at the rate of five per cent upon the preferred half of the securities, and of seven per cent upon the remaining half, would make both securities worth their par value; and this would be equivalent to six per cent upon the whole."

This Court said in the case of,
Lincoln Gas Co. vs. Lincoln, 250 U. S. 256, at 267:

> "We cannot approve the finding that no rate yielding as much as 6 per cent upon the invested capital could be regarded as confiscatory, in view of the undisputed evidence, accepted by the master, that 8 per cent was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other business in the vicinity; 7 per cent being the 'legal rate' of interest in Nebraska."

Plaintiff's lines run into and through many other States, and, as evidence of the correctness of capitalization at not less than eight per cent (8%), it is shown that the taxing boards of the following States, have, for 1921, in arriving at the assessment on the capitalization basis, used the following rates of interest:

Georgia	8%
Alabama	8%
Mississippi	8%
Louisiana	8%
Tennessee	10%
Kentucky	7%
Ohio	8½%
Indiana	8%

(4) The plan of valuation followed to arrive at the assessment complained of imports into the State of North Carolina values which are elsewhere. Such plan violates the Commerce Clause of the Constitution of the United States.

If you capitalize excessive earnings, it is an importation of value, which is contrary to law and the decided cases. A board can not adopt a valuation by stocks and bonds and then tax the appellants upon the proportion of the value so reached that their mileage within the State bore to the total mileage, without deducting a large amount of personal property owned outside of the State, or specially valuable terminals, etc.

Fargo vs. Hart, 193 U .S. 490.
Union Transit Co. vs. Ky., 199 U. S. 194.

Illegality of Ad Valorem Assessment Due to Non-Uniformity and Discrimination.

(5) The County Boards of Review of thirty-two counties through which plaintiff operates made certain horizontal reductions in the assessed value in said counties as a whole of real property. The Commissioner of Revenue declined to give to plaintiff similar horizontal reductions in plaintiff's right of way, lands, and structures thereon, situated in said counties. This declination on the part of the Commissioner of Revenue violates Section 3 of Article 5 of the Constitution of North Carolina and violates the Fourteenth Amendment to the Constitution of the United States. It is an illegal discrimination.

The Uniformity Clause of the North Carolina Constitution and the Fourteenth Amendment to the Federal Constitution have been violated, in

that, while plaintiff's property is alleged by the State to be assessed at its true value for tax purposes, the property of other taxpayers generally in the State is habitually, customarily, and systematically assessed for tax purposes at less than true value.

On December 31, 1920, the Tax Commission reported to the Governor the result of its work under the Revaluation Act of 1919 the following:

> "They (real estate values) were made with reference to actual value on May 1, 1919, and under instructions to use such values with reference to that date as were deemed to be stable. The peak of speculative values in lands was reached in the fall of 1919, after the tobacco and cotton markets for that season developed unprecedentedly high prices for these products, and continued into the first half of 1920. The United States Department of Agriculture makes an annual appraisal of the average value of farm lands in all States. Their estimate of 1919 average value for this State was $47.00 per acre; for 1920, $75.00 per acre. The revaluation average was $38.94, or $8.00 per acre less than the 1919 average. This demonstrates that the revaluation values did not approximate the peak of speculative values. We should be equally cautious to avoid the other extreme of basing values for the future upon a congestion that has temporarily almost destroyed the market for real property." (72, 73)

It appears from the foregoing report of the Board which made the revaluation that as to real

estate values the Board used stable values and not speculative values. We contend that, while using stable values for other taxpayers, the Board used in part speculative earnings as a measure of the value of railroads. The result up to this point is, according to the State, that the railroads were assessed at full value and other property holders at a stable value.

As pointed out before, both the State Tax Commission and the Commissioner of Revenue in assessing railroad property, or in passing on such assessment subsequently, knew that real estate in general had been assessed at less than full value. Notwithstanding such knowledge, railroad property was assessed at full value according to the admission of the State and in excess of full value as viewed by the Southern Railway Company.

In 1920, plaintiff paid its taxes to the State of North Carolina and to its subdivisions under protest, thus bringing to the attention of the taxing authorities the discrimination against plaintiff.

Not yet satisfied with the relative adjustment, acting under Section 28(a) of the Machinery Act of 1921 (15), which had been passed by the Legislature subsequent to the revaluation, the County Boards of Review of sixty-seven counties through which the railroads operate (thirty-two through which plaintiff operates), have reduced horizontally land values in their respective counties in percentages ranging from ten per cent to fifty per cent, as set out in Exhibit "B" to the bill (24) and in the answer (48). This was done under the

said Act upon the theory that the assessment of 1920 was by said percentages in excess of the fair value of the said property on May 1, 1921. Evidently the action of the County Boards was upon the assumption that the revaluation of lands generally in the State was on a speculative war time basis and, therefore, should be reduced horizontally to bring them to a stable value. The contrary is true. As shown by the above report, the assessment of other real property was in the first instance at a stable value and the horizontal reductions reduced the stable value much below normal. This is borne out by the testimony showing that the assessed value to deed value covering six thousand transactions was something less than 67 per cent. Plaintiff sought by petition to the Commissioner of Revenue to have him make similar reductions on its land. This the Commissioner of Revenue declined to do. As shown in the record (24, 48) the tax rates of said Counties have been increased per hundred dollars in amounts ranging from fifteen cents per hundred dollars to eighty-four cents per hundred dollars. The result is that while other taxpayers generally will, due to decrease in assessment and increase in rate, pay no more, if as much, tax as last year, plaintiff will, due to increase in rate, pay on the same assessment, it is estimated, an increased per annum tax of in excess of three hundred thousand dollars.

The State sought to justify this discrimination on two grounds:

(1) That real estate values had been increased

about three times the value of 1919, whereas railroad property was increased only double. We will let the State Tax Commission answer that excuse as follows: "The new assessment of railroads does not represent as great an increase as the average increase of other property, for the reason that they were assessed relatively higher than other property before," etc. (Report of Tax Commission to Governor, dated August 10, 1920, rec. 72.)

(2) Assuming that the value of all the property was assessed at true value in 1920, the State gives as its second reason in justification the fact of the reduction in value of farm lands, due to reduction in value of farm products while it avers (fails to prove) that the value of railroads was not diminished. Plaintiff does not deny the reduction in value of farm products, but it is shown without contradiction that the depression also worked to the reduction of the value of railroads, it being shown for the first six months in 1921 (the only period available at that time) the plaintiff lacked, after paying operating expenses, taxes, hire of equipment, and rents for joint facilities, more than four and a half million dollars of earning sufficient money to pay the interest on its bonded indebtedness (81).

We submit that the Commissioner of Revenue should have at least granted the Railway a similar reduction in its real estate values in the several counties or the average reduction in its total value.

The total real estate assessment in 1920 in the thirty-two counties through which the Southern Railway operates, which reduced their assessments for 1921, was $858,832,162.00. The total assessment in 1921 of same property was $622,927,384.00. The average per cent of reduction being 27.47 per cent. If you reduce the Railway's 1920 assessment of $96,605,694.00 by the average per cent of reduction, namely, 27.47 per cent, you will have as the 1921 assessment the sum of $70,068,110.00.

The affidavits of the plaintiff in these tax cases, which compare the deed value of all deeds recorded for the six months January to June 30, 1921 (more than six thousand in number), with the 1921 assessment of the same property show that the assessed value in the State is 67 per cent of the actual or deed value. This is borne out by the statement of the Tax Commission in its report to the Governor on December 31, 1920, as follows:

> "The United States Department of Agriculture makes an annual appraisal of the average value of farm lands in all states. Their estimate of 1919 average value for this State was $47.00 per acre; for 1920, $75.00 per acre. The revaluation average was $38.94, or $8.00 per acre less than the 1919 average. This demonstrates that the revaluation values did not approximate the peak of speculative values." (73)

The State averred in its answer:

> "It is averred that the assessment of $96,306,357.00 for 1921 is the true actual value thereof." (44)

We submit that it is shown that other property generally in the State is assessed at 67 per cent of its true value (114), whereas railroad property is admitted to be assessed at 100 per cent of its true value (44). It is clearly demonstrated that the horizontal reduction allowed on practically all other land in the State was a reduction from an assessed value that did not before being reduced approximate true value and that the reduction merely increased the discrimination already existing.

C. M. & St. P. vs. Kendall, 278 Fed., 298.

The law on this question has become settled. It is that intentional systematic undervaluation by State officials of certain classes of property, while other classes are assessed at full value or at a higher percentage of full value, is unlawful.

The fact that the two classes of property are assessed by different boards does not cure the discrimination or put the resulting non-uniformity beyond the redress of the Federal Equity Courts.

Greene vs. L. & I. R. R. Co., 244 U. S., 499, 514-16.

Taylor vs. L. & N. R. R. Co., 83 Fed. 350, 364-71.

In this case the Revenue Commissioner sat as a member of the Equalization Board which approved the horizontal reduction made in the coun-

ties and the same official declined to review or change or reduce the plaintiff's assessment.

Discrimination resulting in the deprivation of the equal protection of the law may be brought about either by the act of the legislature in the passage of the tax law, or by the acts of the officers to whom the execution of the law is entrusted. The purpose of the equal protection clause of the Fourteenth Amendment is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute, or by its improper execution through duly constituted agents."

Sunday Lake Iron Co. vs. Wakefield, 247 U. S. 350, at page 352.

Raymond vs. Chicago Traction Co., 207 U. S. 20, at pages 35 and 36.

In *Raymond vs. Chicago Traction Co., supra,* the court stated the rule to the effect that discrimination may result in either of the two ways, beginning on page 35, as follows:

> "The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the State,

violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State."

Plaintiff is concerned primarily with discrimination resulting from the acts of the officers or agents of the State, done in the execution of the tax laws. This discrimination has been intentional, systematic and habitual.

In *Greene vs. L. & I. R. R. Co., supra,* the Court quoting from an opinion by Circuit Judge Taft in *Taylor vs. L. & N. R. R. Co.,* 88 Fed. 350, said, on page 518:

"After pointing out the similarity of the case to *Cummings vs. National Bank, supra,* and declaring (p. 372)): 'An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law,' the Court further said (p. 374): 'The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally and, therefore, fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law,

makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true, although the particular board assessing the complainant's property may have been wholly free from fault or fraud or intentional discrimination.' "

It is thus seen that even though the property of the Southern Railway Company is assessed at its true value, yet if the property of individuals was intentionally undervalued, the result of the whole, taken as one judgment, constitutes a fraud upon the fully assessed property of the railroad.

Discrimination Among Members of Same Class.

(6) In the assessment of railroad properties different methods of assessment were used in the valuation of different members of that class, resulting in illegal discrimination among members of the same class to plaintiff's harm.

In addition to requiring uniformity in taxation, the Constitution of North Carolina also requires that all real and personal property be taxed according to its true value in money. Even though the objects of taxation may be classified, under the uniformity provision, yet there can be no classification which results in real and personal property being taxed other than according to its true value in money. Assuming that property holders or owners may be classified into individ-

uals, corporations and railroads for the purpose of providing different methods of valuation and assessment, yet the methods for the different classes must all lead to the result that the real and personal property of all classes is valued and assessed according to its true value in money.

If property holders are classified for the purpose of providing different methods of arriving at the true value in money of the real and personal property of such classes, the rule of uniformity requires that all in the same class shall have its property valued by the same method. In other words, each railroad in a class is entitled to have its property valued and assessed by the same method used in valuing and assessing the property of other railroads in that class. To be more specific, the State Tax Commission of North Carolina, or the Commissioner of Revenue, as the case may be, could not use one method for arriving at the value of the property of the Southern Railway Company, another method for the Norfolk-Southern Railroad Company, and another for the Atlantic Coast Line, and so on, using for each railroad such method as would serve to give to the property of each railroad a higher value.

The record in this case shows that the assessment is based upon its reconstruction value, less depreciation, as found by the Bureau of Valuation of the Interstate Commerce Commission, while in the case of the Southern Railway Company, the assessment is based upon the capitalization at 6 per cent

of the net income of that company, allotted to North Carolina.

The evidence to sustain this charge is:

> "Affiant is so informed and believes it to be true that the records in the office of the North Carolina Commissioner of Revenue show that the Interstate Commerce Commission has found the reproduction cost, less depreciation, of the entire property in Virginia and North Carolina of Norfolk-Southern Railroad to be $26,023,366. That the total mileage of Norfolk-Southern Railroad is 900.543 of which 790.264 miles, or 87.754%, are in North Carolina. That the assessment fixed in 1921 for Norfolk-Southern Railroad by the Commissioner of Revenue is $22,840,932, or 87.754% of the Interstate Commerce Commission valuation of $25,028,366, before set out." (73)

Had the State Tax Commission, or the Commissioner of the Revenue, adopted this same method in arriving at the value of the property of the Southern Railway Company, such value would have been approximately $60,000,000.00, the amount on which that company has already paid the *ad valorem* taxes. Under the rule laid down in *Raymond vs. Chicago Traction Company,* 207 U. S. 20, this constitntes discrimination. In that case the State Board of Equalization had the duty of making an original assessment upon corporations of the class of the one complaining. From the decision of the Board in making such assessment no appeal is provided for, and consequently

such decision is conclusive, except as proceedings for relief may thereafter be had in the courts. This same Board acted as a Board of Review as to the assessments of local assessing bodies, and as to those assessments also, its decisions were equally conclusive. In pursuance of its authority to assess corporations, the Board assessed the Chicago Traction Company but used a method of assessing this corporation different from the method used in assessing other corporations in the same class. As a result, the Chicago Traction Company was assessed higher than other corporations in the same class. In affirming the judgment of the Circuit Court enjoining the collection of the balance of the tax levied against the Chicago Traction Company above that which had been paid under the direction of the Circuit Court, the Court said, beginning on page 36:

> "The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the State through the board. There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the State, which the State might

do, *Coulter v. Railroad,* 196 U. S., 559, but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations. The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the State in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her, or its property,' was, in this instance omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the State. This action resulted in an illegal discrimination, which, under these facts, was the action of the State through the board."

Franchise Tax.

The following are the grounds upon which we base our contention that the franchise tax law is void and the tax levied thereunder illegal:

1. So-called Franchise Tax Is a Property Tax and Void.

The bill avers that the so-called franchise tax is not a franchise tax measured by the value of the use of the property, but is in truth and in fact an *ad valorem* tax based on the value of the property.

If it is an *ad valorem* tax it is void because not levied equally upon all property holders in the State and is, therefore, contrary to Section 3 of Article 5 of the Constitution of North Carolina, and by reason of the enforcement thereof plaintiff is deprived of the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

This franchise tax is found in Section 82 (6½) of the Revenue Act of 1921. That Section provides:

> "The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for *ad valorem* taxes."

The amount of the franchise tax is one-tenth of one per cent on the assessed value of the property for ad valorem purposes. If the Commissioner of Revenue assessed the railroad for ad valorem purposes at a sum in excess of its true value, that excessive assessment worked also to the harm of the railroad in that it was used in arriving at the franchise tax.

The fact that this tax is called a franchise tax does not make it such a tax.

The syllabus in the case of *Choctaw v. Harrison* reads:

"Neither state courts nor legislature by giving a tax a particular name can take from this court its duty to consider its real nature and effect."

Choctaw vs. Harrison, 235 U. S. 292.
See also *Galveston vs. Texas,* 210 U. S. 217, 227.

"In determining the nature of a state tax and constitutionality of the statute imposing it, this court must regard substance rather than form and the controlling test is found in the operation and effect of the statute as applied and enforced."

St. L. & S. W. vs. Arkansas, 235 U. S. 350, 362.

Where the question, or questions, involved is whether a State taxing law contravenes rights secured under the Constitution of the United States, the decision must depend, not upon the mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed.

St. Louis, etc., Ry. Co. v. Arkansas, 235 U. S., 350.
Crew Levick Co. v. Pennsylvania, 245 U. S. 292.

The legislature has termed this a franchise tax, but, when measured by the definition of a franchise tax under the decisions of North Carolina and the United States Supreme Court, it is not a franchise tax, but a property tax of ten cents on the one hun-

dred dollars. To determine if this be correct, let us examine the decisions in order to ascertain what a privilege or a franchise tax is. The general rule, as set forth in the case of *Worth v. Railroad,* 89 N. C. 301, is:

> "Whenever a tax, as here, is imposed upon a corporation directly by the legislature and is not assessed by assessors, *and the amount depends on the amount of business transacted* by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the value of its property or the nature of the investments made of it, it is a franchise tax. Burroughs on Tax., 169. To the same effect is Attorney-General vs. Bank of Charlotte, 4 Jones' Eq., 287." (Italics the writer's.)

In the *Worth Case, supra,* the property of the defendant railroad had been exempted from taxation under the terms of its charter. In an effort to impose some tax upon that railroad and upon others similarly situated, the State legislature enacted the following law:

> "1. Every railroad or canal company incorporated under the laws of this State, and not liable to a tax upon the property of said company, or the shares thereof, shall pay to the state a tax on the corporation equal to the sum of 1 per cent upon the gross receipts of said company.
>
> "2. Every railroad and canal company incorporated under the laws of this State and doing business herein, and not liable to a tax upon the property of said company, or the tax

mentioned in this section, shall pay a tax of 1 per cent upon the actual cash value of every share of its capital stock, and the tax of twenty-five dollars per mile per annum as a privilege tax, for the year 1881, required by the Act of 1881, chapter 70, schedule C, section 1, to be paid in lieu of the last tax."

In determining whether the three different taxes were franchise taxes or not, the Supreme Court laid down the rule already referred to and thereby determined whether the three different taxes in question were franchise taxes. The tax in section 1, above quoted, was held to be a franchise tax. Likewise, the first tax in Section 2 (one per cent upon the actual cash value of every share of stock) was held to be a franchise tax. In holding the first tax in section 2 to be a franchise tax, the Court said, on page 306:

> "This tax, like the last, is not to be assessed by assessors, but is required to be paid to the Treasurer of the State upon a computation made by him upon a statement rendered by the treasurer of the company of its assets and liabilities, and is, based upon the authorities cited, a franchise tax, to which, as we have shown, the defendant is not liable."

The second tax referred to in Section 2 was also held to be a franchise tax. As said on page 307 of the opinion: "It is paid directly to the treasurer without any assessment by assessors, and is to be estimated by the length of the road."

Under the rule laid down in North Carolina, a franchise tax has the following characteristics:

1. It must be imposed upon a corporation directly by the legislature and not assessed by assessors.

2. The amount depends upon the amount of business transacted by the corporation and the extent to which it has exercised the privileges granted under its charter.

3. The tax must be imposed without reference to the value of its property or the nature of the investments made by it.

The rule as laid down in the *Worth Case* has not been changed by any subsequent case. None of the North Carolina cases cited by the defendants or elsewhere have changed the rule for determining whether a tax is a franchise or a property tax. In all of the cases cited in which the franchise tax has been upheld, the amount of the franchise tax has been measured by the amount of business done or there has been a definite tax charged for the privilege of doing business. For instance, in *Lacey v. Armour Packing Co.*, 134 N. C. 567, affirmed by the Supreme Court in 200 U. S. 226, a license tax of $100.00 was levied upon every meat packing house doing business in the State, for each County in which such business was carried on. This was a stated sum imposed upon each meat packing house for the privilege of doing intrastate business. Likewise, in the suit against *French,*

109 N. C. 722, a privilege tax measured by the amount of purchases was upheld. The other North Carolina cases cited by defendants dealt with similar taxes and none of them changed the rule laid down in the *Worth Case.*

The case of *Provident Institution vs. Massachusetts,* 6 Wall. 611, arose under a Massachusetts statute providing for "a tax on account of its depositors of one-half of one per cent per annum on the amount of its deposits, to be assessed, one-half of said annual tax on the average amount of its deposits for the six months preceding the first day of May, etc." Had this been held to be a property tax it would have been invalid under the State Constitution. In holding it to be a franchise tax the Supreme Court of the United States said, beginning on page 630, as follows:

> "Considered as a tax on property no part of the tax could be supported under the constitution of the State, and there never was a moment when such a tax, if viewed as a property tax, could be upheld since the State was organized under a written constitution. The amount of the tax does *not* depend on the amount of the property held by the institution, but it depends upon the *capacity* of the institution to *exercise the privileges conferred by the charter.*
>
> "*Valuation of property has nothing to do with determining the amount of the tax,* but the amount depends on the average amount of the deposits for the six months preceding the respective days named, and it is quite obvious that there is no necessary relation between the

average amount of the deposits and the amount of the property owned by the institution. Granting that it is not a property tax, then it must be considered as a franchise tax laid upon the corporation for the privileges conferred by the charter, which, by all the authorities, it is competent for the State to tax irrespective of what disposition the institution has made of the funds, or in what manner they may have been invested. Counties, cities, towns and school districts, as well as the State, may impose and levy reasonable assessments, rates and taxes upon property, but the assessment to the corporation defendants, if paid, exempts them from all other taxation for the current year."

And further, beginning on page 631:

"Franchise taxes are levied directly by an act of the legislature, and the corporations are required to pay the amount into the State treasury. They differ from property taxes, as levied for state and municipal purposes, in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection, and they are in lieu of all other taxation, state or municipal. Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a *franchise tax* depends upon the *business transacted* by the corporation and the extent to which they have exercised the privileges granted in their charter. Unlike as the two systems are in every particular, it seems to be a work or supererogation to point out the dif-

ferences, which are radical and substantial." (Italics the writer's.)

The rule is set forth in *State vs. Stonewall Insurance Company,* 89, Ala. 335, 7 So. 753, on page 754, as follows:

> "Owing to the difficulty of distinguishing between the capital, and the property in which it is invested, tests for determining whether a tax is on the property or the franchises may be regarded, generally, as uncertain and unsatisfactory; yet its determination is often necessary, for, if a franchise tax, the property in which the capital is invested becomes immaterial. The usual and most certain test is whether the tax is upon the capital stock, *eo nomine,* without regard to its value, or at its assessed valuation in whatever it may be invested. If the former, it is a franchise tax; if the latter, a tax upon the property."

A franchise tax is not a tax on the property of the corporation.

Tremont, etc., v. Lowell, 59 N. E. 1007.

A franchise tax when applied to a domestic corporation is the tax upon the right of a corporation to exercise the privileges conferred upon it, and is not a property tax.

Chicago & E. I. R. Co. v. State, 51 N. E. 924.

The franchise tax is not laid on property at all, but is imposed on the corporation for the privilege

of carrying on business in the State and exercising corporate franchises granted by the State.

People v. Knight, 174 N. Y. 475, 67 N. E. 65.

In a note in 57 L. R. A. the rule is stated as follows on page 48:

> "A franchise tax and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted by laying them and fixing their amounts. If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as a franchise tax; but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although franchise privileges may be included in the valuation, it is considered a property tax."

Disregarding the designation given the so-called franchise tax by the legislature and looking at it in the light of the characteristics of a franchise tax set forth by the Supreme Court of North Carolina and other courts, this so-called franchise tax has none of the incidents of a franchise tax, but all of the incidents of an ad valorem tax. It is assessed by the same assessing officer that assessed the property for the ad valorem tax. As a matter of fact, it is the same assessment and the tax is imposed

upon the property to the same extent as it is imposed upon the property in the case of the ad valorem tax. The amount of the tax is not measured by the value of the property of complainant in North Carolina, used in its business, whether intrastate or interstate, nor is it measured by the volume or amount of business done in North Carolina. By the terms of the statute under which it is imposed, the value of complainant's property in North Carolina for the ad valorem tax is taken to be the value of the franchise for the purpose of the so-called franchise tax. If the value increases, the tax increases; if it diminishes, the tax diminishes.

If we are correct that this tax is nothing more nor less than an additional ad valorem or property tax, it is void because not levied equally upon all property holders in the State and is, therefore, contrary to Section 3 of Article 5 of the Constitution of North Carolina, and, if enforced, plaintiff will be deprived of the equal protection of the law secured under the Fourteenth Amendment to the Constitution of the United States.

2. The Tax Is Measured by the Property Owned in the State.

The situation is this: The Tax Commission assessed plaintiff's property for taxation in 1920 at $96,605,694.00 and the Revenue Commissioner assessed the property in 1921 at $96,306,357.00, a reduction of $299,000.00. The defendants explain the reduction in their answer as follows:

"He (Revenue Commissioner) merely exercised the authority given him to review the said assessment of 1920, and reduced the same to ninety-six million three hundred and six thousand three hundred and fifty-seven dollars ($96,306,357), as hereinbefore stated, refusing to reduce the said assessment of 1920, except by the application to it of certain *reductions* on properties of the plaintiff lying off the right of way as hereinafter stated." (38)

See also the answer Rec. p. 43.

The foregoing shows that the total included all the property, not only that assessed by the Commissioner of Revenue, but that assessed locally; otherwise the deduction would not have been made. The plaintiff owns non-carrier property which is assessed locally.

The franchise tax law (82(6½)) provides that such tax be levied on the value of the property, tangible and intangible, assessed for ad valorem taxes, and acting thereunder the State levied and collected in 1920 a franchise tax of $96,605.69 and in 1921 demanded a franchise tax of $96,306.35 (69, 70), being one-tenth of one per cent of the value of all of plaintiff's property in North Carolina for ad valorem purposes. This is admitted in the answer (38, 53). The law as set forth in Sec. 82(6½) so provides.

In Section 62 of Chapter 92, Public Laws, 1919, it is provided that there shall be a deduction of the property assessed locally from the total assessed value "before the apportionment is made to the

counties and municipalities." The purpose of the deduction is to allocate to counties and cities certain local property before dividing the total on a mileage basis, but nowhere is it provided that the franchise tax shall be calculated on the total less the local property. On the contrary, the franchise tax in 1920 and 1921 was on the total less only the "reductions" made by local taxing authorities.

As we understood the argument below, if as we say, the franchise tax was based on the total ad valorem assessment of all property an improper measure had been used, but that if such were the case it could be corrected by the Court. We think this an error. No change contrary to the statute can be made by the tax authorities or the Court.

See *Oklahoma vs. Wells Fargo & Co.*, 223 U. S., 198, in which case the court held that "where a state statute requires that a corporation doing both interstate and intrastate business return its gross receipts from all sources, the taxing feature of the statute cannot be construed as relating only to receipts from intrastate commerce, and sustained separately in that respect." In reaching this conclusion, the court said, on page 302:

> "Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

To the extent that this tax is measured by such property as is not used in the business in North

Carolina, there is imposed an additional tax upon such property. This is in violation of the Constitution of North Carolina, and renders the tax invalid.

There is this further objection to the so-called franchise tax: In all States of which we have any knowledge other than North Carolina, the law provides for a method of ascertaining the total value of the property by capitalizing the net income or by fixing the total value of the capital stock and from this total there is deducted the assessed value of the tangible property and what is left is held to be the value of the corporate franchise. In North Carolina the law provides for a method of arriving at the total value, namely, by arriving at the tangible and the intangible value. It then provides that this total shall be assessed as the franchise value. The result is that the assessed value for *ad valorem* purposes includes an intangible value or the value of the franchise, and the assessed value of the franchise includes the assessed value of the tangible. This is not right nor is it legal.

3. The Amount of Franchise Tax Is Double the Amount it Should be Under Section 82(3½) of the North Carolina Revenue Law.

Section 82(3½) of the Revenue Act, Chapter 34, Public Laws, 1921, provides:

"That where a report required to be made

under the provisions of this Section to the State Tax Commission by any domestic corporation or the report of any foreign corporation shows the proportion of the capital stock of such foreign corporation apportionable to this State under the rules laid down in Section 82 of this act to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which such report is made, the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation in this State."

Southern Railway reported under that Section 82(6½) a capital stock of $120,000,000.00 and a preferred stock of $60,000,000.00, making a total of $180,000,000.00. Apportioned on a mileage basis, the capital stock of plaintiff apportioned to North Carolina would be $28,222,626.00. One-half of the assessed value for taxation would be forty-eight million dollars. Therefore, the capital stock apportioned is less than half of the assessed value. Notwithstanding this, the franchise tax of plaintiff is demanded on the full value for *ad valorem* purposes, instead of on one-half of the total assessed value. Doubtless the State holds that the above quoted Section 82(3½) does not apply to railroads because of Section 82(9), which reads as follows:

"That nothing in the nine preceding sub-sections of this act shall apply to banks, insurance companies, fraternal beneficent associations, building and loan associations, express, telephone or telegraph companies, or other corporations, upon which a franchise tax may be levied in other sections of this act."

This is, we think, an error, because Sub-section (9) of Section 82 provides that the nine preceding sub-sections shall not apply to the named companies or to "other corporations, upon which a franchise tax may be levied in *other* sections of this act." Railroads are not assessed in other sections of this act, but in this section of the act, and therefore Sub-section 82(3½) applies to railroads.

This is made more certain by a history of the legislation. Section 82(9) of Chapter 90 of the Laws of 1919, provided that the nine preceding sub-sections should not apply to various companies and named a railroad as one of the companies to which the preceding sub-sections did not apply. The 1920 Revenue Law, in Chapter 1, Public Laws, Extra Session 1920, Section 7(d), amended Section 82, Sub-section (9) as follows:

"By striking out of the third line of the said sub-section the word 'railroad.'"

It is therefore plain that it is not an unintentional omission.

Our contention is made certain by Section 3 of

Chapter 102, Public Laws, Extra Session 1921, approved December 19, 1921, which reads:

> "Sec. 3. That chapter thirty-four, Public Laws of one thousand nine hundred and twenty-one, section eighty-two, sub-section (9), be and the same is hereby amended by inserting the word 'railroads' in line two thereof between the words 'to' and 'banks.'"

We contend that the status of the law at the time the assessment was made and the franchise tax became due shows plaintiff entitled to the benefit of Section 82(3½).

4. If the Tax Levied Under Section 82(6½) is a Franchise Tax, it is Invalid in That it is an Unconstitutional Burden on Interstate Commerce.

As stated heretofore, we think that while this tax is called a franchise tax, it is in truth a property tax. If we are in error as to this, then it seems to us clear that the tax can not be upheld as a privilege tax. It is an unconstitutional burden on interstate commerce. In our discussion of this tax, we refer, of course, to the law as it stood in Section 82(6½) of the Revenue Act of 1921 at the time the levy was made and at the time the bill in this case was filed. We do not refer to the effort made by the Legislature at its Special Session of December, 1921, to correct the illegality of Section 82(6½) by repealing that Section and amending the law by enacting Section 78.

It will be well to note the difference between Section 82(6½) and the new Section 78—

Section 82(6½)	New Section 78
"* * * the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated."	"* * * the Commissioner of Revenue shall ascertain and certify to the State Auditor the value upon which the amount of tax to be paid by any such railroad as a license or privilege tax shall be calculated."
"* * * the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each railroad company in the State assessed for the year in which such report is made for *ad valorem* taxes."	"* * * the measure of extent to which every such railroad company is carrying on intrastate commerce within the State of North Carolina shall be the value of the total property, tangible and intangible, in this State of which such railroad company is assessed for *ad valorem* taxation for the year in which such report is made.
"The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be," etc.	"The tax which every railroad company shall pay for the privilege of carrying on intrastate commerce within this State shall be," etc.
	"Provided, that it is the intention of this section to levy upon railroads a license or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within the State of North Carolina and not a part of interstate or foreign commerce; that the tax provided for in this section is not intended to be a tax on the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State."

The old law levied a franchise or privilege tax for the exercise of the railroad's franchise in the

State. The amended law levies a license or privilege tax for the carrying on of intrastate commerce within the State of North Carolina. The proviso or saving clause at the foot of the new law seeks to set forth a constitutional intent. If the law burdens interstate commerce, it is unconstitutional, and whether it does or not will depend upon its practical operation.

International Paper Co. vs. Mass., 246 U. S. 135.

From the many decisions of the Supreme Court of the United States, there may be deduced the following fundamental principles as underlying all taxation wherein interstate commerce is involved:

(1) "No State can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce."

(2) "This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce."

(3) "The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, providing at least the franchise is not derived from the United States."

See *Atlantic, etc., Telephone Company vs. Philadelphia*, 190 U. S., 160, 162, 163, and cases therein cited in support of the above propositions.

We have made an earnest effort to square this law with the above principles and have reached the conclusion that it violates these principles.

For convenience, we set out a part of Section 82(6½):

> "Sec. 82(6½). *Railroads.* Every railroad company doing business in this State shall annually on or before the thirtieth day of July make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for ad valorem taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one per cent (0.1%) of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year."

The points to which we direct attention in the foregoing law are that what is levied is a franchise or privilege tax for the privilege of exercising its franchise in the State based upon the ad valorem value. This law burdens interstate commerce when read in connection with Section 64 of the Machinery Act, which sets forth the method of assessment of tangible and intangible property of railroads in North Carolina to find the ad valorem value and is, in part, as follows:

"Sec. 64. *Tangible and intangible property assessed separately.*

"(a) At such dates as real estate is required to be assessed for taxation, the said commission shall first determine the value of the tangible property of each division or branch of such railroad of rolling stock and all other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property.

"(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness,

bonds, or any other securities, the value of which is based upon the earning capacity of the property.

"(c) The aggregate value of the physical or tangible property and the franchise as thus determined, shall be the true value of the property for the purpose of an ad valorem taxation, and shall be apportioned in the same proportion that the length of such road in each county bears to the entire length of such division or branch thereof," etc.

In the foregoing Section 64, North Carolina has imposed a *property* tax upon the property of the Southern Railway Company situated in North Carolina, whether such property is employed in intrastate commerce or interstate commerce or both, and such a tax is permissible. In addition, there is added to the tangible value the franchise value and that franchise value is to be arrived at by a consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public as evidenced by the market value of all capital stock and securities. The effort was and the result is that the property of the Southern Railway Company is valued as a going concern and the franchise value is arrived at and taxed as property, notwithstanding the factors used in arriving at this property franchise value include values derived from interstate commerce. That value from interstate commerce is included is certain in that the law di-

rects: (1) that the gross earnings be used, as compared with the operating expenses and such gross earning are not confined to earnings within the State, and (2) by a consideration of the market value of all the capital stock, bonds and other securities not limited to securities issued on property within the State or to the value of the securities derived from intrastate business, but necessarily including interstate values as well. It is permissible under the decisions of the Supreme Court of the United States to arrive at the ad valorem value in the manner set forth.

The franchise tax law, as has been seen, is not measured by the amount of intrastate business done, nor by the value of the property in the State used in intrastate commerce, but, as stated, by the value of the property in the State for ad valorem taxes, which value, as we have attempted above to show, includes the value of the franchise as a going concern engaged in both interstate and intrastate commerce. While a property tax might be so levied in an effort to and as a means of ascertaining the value of property situated in the State, a privilege tax can not, under the decisions, be so levied.

The Supreme Court states the rule as follows:

> "Consistently with the Commerce Clause of the Federal Constitution, the State could not tax the privilege or act of engaging in interstate commerce, but could tax the Company's property within the State, although chiefly employed in such commerce."

Wells Fargo vs. Nevada, 248 U. S., 165, 167.
Adams Express vs. Ohio, 165 U. S., 194, 220.
Harrisburg vs. Texas, 210 U. S., 217, 225, 249.

The privilege of doing an interstate business in the State of North Carolina is not one conferred upon the Southern Railway Company by that State and therefore that State can not impose a franchise tax upon the Southern Railway Company for using its franchise in interstate business in the State. This rule is stated in *Kansas City Railway vs. Kansas,* 240 U. S., 227, at page 231, as follows:

> "It must be assumed in accordance with repeated decisions, that the State can not lay a tax on interstate commerce 'in any form,' by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it."

In *Postal Telegraph & Cable Company vs. Adams,* 155 U. S., 688, 695, Chief Justice Fuller said:

> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."

The State could not levy a franchise tax for the privilege of doing an interstate business. It has levied a franchise tax without specifying whether it is for the privilege of doing an intrastate business or for the privilege of doing interstate commerce, but it is based on a value which includes a franchise value derived from the doing of interstate commerce as well as intrastate commerce. If that is legal, then the State has done indirectly what it could not do directly.

In this particular case, the burden on interstate commerce is, under the principles above enunciated, clearly shown in this: The State arrived at its value by capitalizing $6,117,625.00. That sum was supposed to be the North Carolina proportion of the net derived from both interstate and intrastate commerce. As before stated, the use of that method to determine the value of the physical property when you levy an ad valorem tax has been upheld, unless contrary to the statute and unless wrong amount capitalized, but when you levy a privilege tax and arrive at the value in the manner above stated, you are necessarily levying indirectly a privilege tax for the doing of interstate commerce. That the franchise tax imposed upon railroads by the laws of North Carolina is invalid and that the foregoing principles are correctly applied to the case is shown by the decisions of the Supreme Court of the United States.

In the case of *Galveston, etc., Ry. Co. vs. State of Texas,* 210 U. S., 217, that Court considered a

statute of the State of Texas imposing a tax upon all railroads within that State equal to one per centum of its gross receipts, and held it invalid. In reaching that conclusion, the Court said, beginning on page 227, as follows:

> " 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' *Postal Telegraph Cable Co. vs. Adams,* 155 U. S., 688, 697. See *New York, Lake Erie & Western R. R. Co. vs. Pennsylvania,* 158 U. S., 431, 438, 439. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. This must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its

nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard vs. Morgan,* 185 U. S., 27, 37; *Asbell vs. Kansas,* 209 U. S., 251, 254, 256.

"We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States."

In *Western Union Telegraph Co. vs. Kansas,* 216 U. S., 1, a statute of Kansas provided among other things that before a foreign corporation, even one engaged in interstate commerce, should have authority to do local business in the State, it should pay a graduated franchise tax upon its authorized capital. In holding this tax invalid, this court, beginning on page 26, said:

"We are aware of no decision by this court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent in fact on the value of its property situated within the State.' *Postal Telegraph Co. vs. Adams,* 155 U. S. 688, 696; *Leloup vs. Mobile,* 127 U. S. 640, 649. On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State

from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, on account of such business.

"But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

It may appear on a first reading that the rule as laid down in the *Galveston Case* in 210 U. S., and

the *Western Union Case* in 216 U. S., is overruled by the case of *St. L. & S. W. Ry. vs. Arkansas,* 235 U. S. 350. There are certain excerpts in the *St. L. & S. W. Case* which taken alone might indicate a contrary holding, but the decision as a whole does not change the rule laid down in the above cases. In the *St. L. & S. W. Case* the Attorney General brought suit for the sum of $6,798.26, being the franchise tax with penalty and interest.

The Court, in the *St. L. & S. W. Case,* at p. 363, said:

> "The tax, as will be observed, is not in anywise based upon the receipts of the railway company from interstate commerce, either taken alone or in connection with receipts from its intrastate business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or the value of the business done, we are relieved from those difficulties that arise where said taxes are based upon the earnings of interstate carriers."

citing the *Galveston Case* and others.

The North Carolina tax is not in terms based upon the receipts of the railroad company from interstate commerce, but it is based upon a value a part of which value is derived from interstate business as well as local business, and if the North Carolina statute be followed, the amount of the tax would fluctuate with the volume or the value of the business done. This seems clear, because

to arrive at the value which is the basis of the tax, the statute says that the Revenue Commissioner *shall* consider the net earnings, not limiting them to the net earned in the State, and shall particularly consider the value as ascertained from the market value of the stocks and bonds, in which case it is impossible to limit them to a State value. Therefore, in the *North Carolina Case* the Court is confronted with the difficulties that arose in the *Galveston* and other cases.

It is true that a tax may be imposed on the property of a railroad within the State of North Carolina and value derived from use of such property in interstate commerce may be included, but it has nowhere been held, and we do not think it will be held, that a privilege tax can be based on an ad valorem value if the law compels the ad valorem value to be ascertained by considering elements which bring in the earnings from interstate commerce which fluctuate from time to time.

The later decisions of the Supreme Court make it clear that it was not the intent of the Supreme Court to overrule the *Galveston Case* in the 210th U. S., or the *Western Union Case* in the 216th U. S.

See *International Paper Co. vs. Massachusetts*, 246 U. S. 135.

The cases above referred to did not deal with statutes precisely like those of North Carolina, but they lay down the fundamental principles and rules by which the validity of the franchise tax in question must be determined.

North Carolina has attempted to exercise its taxing power with respect to a matter under its jurisdiction, but it has attempted to exercise it in a wrong manner when it adopted as a measure of the tax the value of the tangible property plus the value of the use of the franchise in interstate commerce plus the value of the use of the franchise in intrastate commerce. North Carolina cannot impose a franchise tax on the Southern Railway Company for the privilege of engaging in both interstate and intrastate commerce, yet in imposing a franchise tax on the privilege of engaging in business and measuring the tax in part by the value of the use of the franchise in interstate commerce, it has attempted to do indirectly what it could not do directly. The tax is therefore invalid as an unconstitutional burden on interstate commerce.

5. The Franchise Tax Law is Invalid in That it Imposes a Condition Upon the Right of This Foreign Corporation Engaged in Interstate Commerce to Transact Interstate Commerce.

Attention is directed to the following Sections of the North Carolina Revenue Act of 1921:

Section 82(6½) levies a franchise tax of one-tenth of one per cent on "Every railroad company doing business in the State, etc."

Section 82(17) provides, in substance, that if a corporation, wherever organized, fails for ninety days to pay the tax levied under this law, the Com-

mission shall certify the fact to the Secretary of State. The Secretary of State shall thereupon "cancel the certificate of authority of any such foreign corporation to do business in the State." Thereupon all the privileges and franchises conferred upon such corporation by such certificate shall cease and determine.

Section 82(20) provides that in addition to all other remedies for the collection of any taxes due under this Act, the Attorney General shall, upon request of the State Treasurer, whenever any such taxes have remained unpaid for ninety days, apply to the Superior Court of Wake County or of any County in the State in which such corporation has an office for an injunction "to restrain such public utility or corporation from the transaction of *any* business within this State until the payment of such taxes," etc. (Italics the writer's.)

Section 85 provides that a license must be procured before beginning business and each corporation which engages in any business for which a license is required shall procure said license in advance. Any corporation which engages in any business for which a license is required by this Act without first having procured a license therefor shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the Court: Provided, the fine shall not be less than 20 per cent of the tax in addition to the tax and the cost.

The decided cases are plain that payment of the tax cannot be made a condition precedent to the

right of the corporation to carry on business, including interstate commerce.

In the case of *Ludwig vs. Western Union Telegraph Company,* 216 U.S. 146, the Supreme Court of the United States had under consideration an Act of the State of Arkansas entitled, "An Act to Permit Foreign Corporations to Do Business in Arkansas and Fixing Fees to Be Paid by All Corporations." Section 2 of the Act provided in part, "Any foreign corporation *which shall fail to comply with the provisions of this Act,* and shall do *any* business in this State shall be subject to a fine," etc. The Court, in discussing the case, after referring to the fact that the statute was "made applicable to *every* company," said at page 156:

> "We have seen that the Act of 1907 provided that if any foreign corporation, without the consent of the other party to any suit brought by or against it in any state court should remove such suit to the Federal Court, or institute a suit against a citizen of Arkansas in the Federal Court, it became the duty of the Secretary of State to forthwith revoke all authority in the company and its agents to do business in Arkansas and publish such revocation in some newspaper of general circulation in the State; and if after such revocation the company continued to do *any* business in Arkansas it became subject to a fine of not less than $1,000 *for each day* it so continued, to be recovered by suits instituted by prosecuting attorneys in the name of the State for the use and benefit of the County in which the suit was brought; so, if the company failed to comply with any of the provisions of the act it became subject

to a fine of $1,000," etc. (Italics are in opinion.)

After referring to the fact that the statute was "made applicable to *every* company," it said at page 160:

> "According to the words of the statute, not unreasonably construed, every corporation of another State, seeking to do business in Arkansas, whether interstate or domestic, in order that it may do business of any kind in Arkansas, without coming into conflict with the statute, must file a copy of the authenticated charter with the Secretary of State; and it seems that before that officer will file such copy the corporation must pay to him a given amount based upon its capital stock, representing, necessarily, *all* its business, interstate and intrastate, as well as *all* its property everywhere, *beyond as well as within the State.* If the foreign corporation, without first paying those amounts, does business of any kind in the State it will incur not only the penalty of $1,000 for so doing but will forfeit its right to make any contract in the State, enforcible in law or equity—whatever its subject-matter—even if it be one relating to the business of the United States or to commerce among States. A statute of that kind would be palpably in conflict with the Constitution, and, especially an invasion of rights under that instrument of a corporation engaged in interstate commerce and seeking to do business in Arkansas."

It was pressed upon the Court that, due to certain decisions of the Arkansas court, the statute should be construed to have been intended only to impose terms upon the right to carry on *intra*state business and was valid. The Court said "but the acceptance of this view would not remove the difficulty which confronts the State in the present case." It held that the requirement that the foreign corporation pay a tax based on its entire capital stock or incur drastic penalties was in effect a condition under that statute for engaging in interstate business and therefore void as a burden thereon.

A similar situation was presented in the case of *Illinois Central v. Mississippi Railroad Commission*, 229 Fed. 248. In its opinion, the Court said, on page 255, what is equally applicable to this case:

> "From them the conclusion is irresistible that a State statute exacting of one engaged in interstate commerce and governmental business a license for the privilege of doing business, in general terms and without expressly exempting from its terms interstate and governmental business, and which has not been construed to do so by the court of last resort of the State of its enactment, is to be construed as exacting a license for engaging in all business, including interstate commerce and governmental business, as to persons or corporations so engaged, and void as to them, though so measured as not to come in conflict otherwise with the constitution. Under the language of the Act of Mississippi, railroad com-

panies could be prosecuted for exercising the privilege of doing a railroad business without taking out a license, though they were engaged in business purely of an interstate and governmental character, and there has been no contrary construction of this Act in this respect by the Supreme Court of Mississippi."

In the case of *Underwood Typewriter Company v. Chamberlain,* 254 U. S. 113, the Court, at page 119, said:

"It is contended that the tax burdens interstate commerce and hence is void under Section 8 of Article 1 of the Federal Constitution. Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 364; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce."

In the case of *St. L. & S. W. Ry. v. Arkansas,* 235 U. S. 350, the Court had before it a statute of Arkansas prescribing fees to be paid by domestic and foreign corporations for the privilege of doing intrastate business in Arkansas, and said, at page 368:

"If this must needs be construed to mean that for non-payment of the franchise tax a

> foreign railroad corporation engaged in business as a common carrier of intrastate and interstate commerce is to forfeit its right to do business in the State, not only with respect to intrastate but also with respect to interstate commerce, the effect would be to impose a condition upon its right to transact interstate commerce, and the act would be invalid as amounting in effect to a regulation of that commerce; unless, indeed, Section 20 could be treated as separable. This result would follow from the principles laid down in Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 554; Leloup v. Port of Mobile, 127 U. S. 640, 644, 647; Western Union Telegraph Co. v. Alabama, 132 U. S. 472, 477; Allen v. Pullman Co., 191 U. S. 171, 179; and many other cases."

It is true the Court held that Section 20 of the Act, then under consideration, did not require it to be so construed as to interfere with interstate commerce, saying:

> "The forfeiture in terms is of 'the right of such corporation to do business in this State.' This does not necessarily include the right to transact business that is done partly within and partly without the State. The section does not call for an annulment of the charter."

Section 20 of the Act, then under consideration, as set forth by the Court on page 353, was in part:

> "In case any corporation shall fail to pay the franchise tax prescribed by this Act when it becomes due during the term of said certifi-

cate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in this act."

Attention is directed to the fact that under Section 20 of the Arkansas statute the corporation shall forfeit its right "*to do business* in the State," whereas under Section 82(20) of the North Carolina Act, the Attorney General shall enjoin the "corporation from the transaction of *any* business within this State until the payment of such taxes, or fees and penalties thereon," etc.

Construing this Section of the Act in connection with the body of the Act, which levied a privilege tax for "the exercise of the railroad's franchise in the State" (not limited to intrastate business, as is done by the amendment), it seems to us that the plain ordinary meaning of the words prohibiting the doing of *any* business necessarily includes interstate business.

The language of Section 82(20) gives the Attorney General the right to apply "for an injunction to restrain such public utility or corporation from the transaction of *any* business within this State." For the Southern Railway to take a shipment from a point in North Carolina, destined to a point without the State of North Carolina, is enaging in business within the State.

The failure to limit this tax to intrastate commerce is noteworthy, especially since it was so lim-

ited where imposed on other corporations engaged in interstate commerce.

Under Section 77, the tax on chair and sleeping cars is limited to the gross receipts from passengers carried within the State.

Under Section 79, a privilege tax is imposed on express companies and it contains a proviso that "nothing in this Section shall be construed to authorize the imposition of any tax upon interstate commerce, or for any business transacted for the Federal Government."

Under Section 80, privilege tax is imposed upon telegraph companies, and such section contains the same proviso as contained in Section 79.

It seems, therefore, that it was not the intention of the legislature to impose the so-called franchise tax upon railroads for the privilege of engaging in intrastate commerce alone. Had it so intended, it could have evidenced that intent as it did in the case of other public utilities engaged in interstate commerce and as it did in the amendment passed December, 1921. Even though it had been the intention of the Legislature to limit such tax as imposed upon the privilege of engaging in intrastate commerce, nevertheless, it has exacted payment thereof as a condition precedent to the right to engage in interstate commerce, since it has provided that an injunction shall be issued to restrain from doing "any business."

Principles Governing Issuance of Interlocutory Injunctions.

As has been frequently held, the issuance of a preliminary injunction calls for the exercise of sound judicial discretion. In this case, since the statute provides for an appeal from the refusal of the interlocutory injunction asked, the duty is upon this Court to review the exercise of the discretion.

The text writers, the English Courts, the Federal Courts and the State Courts are practically unanimous in upholding the below set forth principles governing the issuance of a temporary injunction.

The rule in such cases is set forth in 1 High on Injunctions, Sec. 5, page 8, as follows:

> "Interlocutory injunction not decisive upon the merits, it is to be constantly borne in mind that in granting temporary relief by interlocutory injunction, courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in statu quo* until a hearing upon the merits, without expressing, and indeed without having the means of forming a final opinion as to such rights. And in order to sustain an injunction for the protection of property *pendente lite* it is not necessary to decide in favor of plaintiff upon the merits, nor is it necessary that he should present such a case as will certainly entitle him to a decree upon the final hearing, since he may be entitled to an interlocutory injunction, although his

right to the relief prayed may ultimately fail. Nor is the decision of the court in granting or refusing a preliminary injunction conclusive upon either the court or parties on the subsequent disposition of the cause by final decree. The Court will not, however, upon an application for an interlocutory injunction, shut its eyes to the question of the probability of plaintiff ultimately establishing his demand, nor will it by injunction disturb defendant in the exercise of a legal right without a probability that plaintiff may finally maintain his right as against that defendant. And where the question involved is merely of a pecuniary nature, plaintiff will not be allowed an interlocutory injunction unless he can satisfy the Court that there is a probability that his bill will not be dismissed upon the hearing."

The rule is stated in 10 Encyc. Pl. & Pr. 1010, as follows:

> "It is not proper, on an application for a preliminary injunction, to decide, or to consider with a view to a final decision, the merits of the controversy, especially where grave questions of law are involved; and the Court should do no more than determine that the bill, assuming its allegations to be true, sets forth facts sufficient to warrant the issuance of an injunction."

And in 22 Cyc. 751, as follows:

> "It is not sufficient ground for refusing a preliminary injunction that it is not absolutely certain that complainant has the right that he claims or that the injury feared will occur;

and even though complainant's right to permanent relief is doubtful it may be proper to maintain the *status quo* pending the determination of his right, the issuance of a temporary injunction in such cases depending chiefly upon the relative inconvenience to be caused the parties."

See also 14 R. C. L., 357.

That the same rule prevails in England is shown by three English cases cited in *Harriman vs. Northern Securities Company,* 132 Fed. 464, on page 477. In that case, the Court quoted the rule from *Glascott vs. Lang,* 3 Myl. & C. 451, 455, as follows:

"In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the Court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

See also *Great Western R. R. Co. vs. Birmingham, etc., R. Co.,* 2 Phil. Ch. 597:

The rule as applied in the Federal Courts is stated in *Harriman vs. Northern Securities Co.,* 132 Fed. 464, beginning on page 475, as follows:

"The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial dis-

cretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and that of the defend-

ant, without necessarily being determinative of the propriety of allowing or denying the injunction."

See also *Allison vs. Corson* (Circuit Court of Appeals, Eighth Circuit), 88 Fed. 581, at page 584.

The foregoing decisions apply the rule of "comparative inconvenience," in the matter of issuance of injunctions. In this case, if the temporary injunction is not granted, the appellant will be subject to immediate and irreparable loss. It will be required to pay the taxes or suffer the penalties, a cloud would be cast upon the title to its property, and other irretrievable loss would fall upon it. As a practical matter, if the interlocutory injunction is denied and the Railway Company pays the taxes, the tax collecting officers would immediately disburse the same, and if the Railway finally prevailed in its suit, its judgment in many cases would not be of value because there would be no funds out of which it could make a recovery, and if there were it would require one hundred and fifty-seven separate suits in order to recoup. To recover the franchise tax an Act of the legislature would be required. The bill in its present shape does not pray a money judgment and no such judgment could in this case be recovered against the individual defendants. Unless, therefore, the temporary injunction is granted, a final victory on the part of the plaintiff will be in large measure fruitless. On the other hand, if the application for temporary injunction should be granted, there will be

no final disadvantage to the State if it ultimately wins; it will have the same property as security for the taxes and will receive payment in full with interest. In addition to this, the State has already received a very substantial part of the taxes claimed. The plaintiffs have not sought to delay the final outcome; on the contrary, they offered in writing to try the case on its merits the past summer term and are now willing and anxious for a final hearing. Weighing the situation of the two parties, an equity court should, we submit, under well established principles, grant the application for an interlocutory injunction.

Respectfully submitted,

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APPENDIX

EXTRACTS FROM CONSTITUTION OF NORTH CAROLINA:

ARTICLE V.

Section 3. Taxation Shall be by Uniform Rule and ad Valorem: Exemptions. Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money * * * The General Assembly may also tax trades, professions, franchises and incomes, etc.

Section 6. Taxes Levied for Counties The total of the state and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the state for the term required by article nine, section three, of the constitution: Provided, further, the state tax shall not exceed five cents on the one hundred dollars value of property.

ARTICLE VII.

Section 9. All taxes levied by any county, city, town or township shall be uniform and ad valorem upon all property in the same except property exempted by this Constitution.

EXTRACTS FROM CONSOLIDATED STATUTES OF NORTH CAROLINA:

Section 7979. Remedy of Taxpayer for unauthorized tax. Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthor-

ized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole of in part, nor to restrain the sale of any property for the non-payment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city, or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer.

EXTRACTS FROM CHAPTER 84, PUBLIC LAWS OF NORTH CAROLINA, SESSION 1919.

(REVALUATION ACT)

An Act to Provide for the Listing and Valuing of All Property, Real, Personal and Mixed, at Its Real Money Value.

The General Assembly of North Carolina do enact:

Chapter 234, Public Laws, 1917, continued in force for listing of property for 1919.

Section 1. That chapter two hundred and thirty-four of the Public Laws of one thousand nine hundred and seventeen, entitled "An Act to amend chapter two hundred and eighty-six of the Public Laws of one thousand nine hundred and fifteen, in relation to the assessment of property and the collection of taxes," be continued in full force and effect for the listing and valuing of all property for the year one thousand nine hundred and nineteen, and that the said act shall continue in full force and effect, except in so far as the said act may be revised and amended by this session of the General Assembly, and except in so far as it may be in conflict with the provisions of this act, and in all such cases where there may be such conflict the provisions of this act shall govern: Provided, the valuations lawfully fixed on real property in the year one thousand nine hundred and fifteen, except where such valuations have been or may be in the year one thousand nine hundred and nineteen changed on account of structures erected or destroyed since the valuation of one thou-

Proviso: valuations of 1915 except where changed on account of structures erected to remain valuations for 1919.

sand nine hundred and fifteen, or otherwise changed according to law, shall remain the valuation of such real property for the year one thousand nine hundred and nineteen.

Machinery provided for making complete value of all property, in accordance with Constitution.

Sec. 2. That for the purpose of making a complete list of all the property of every citizen of the State, real, personal and mixed, and of having all of such property valued in accordance with the rule laid down in the Constitution of the State at its true value in money, and to be adopted and used as the basis of all taxes levied by the State, counties, cities, towns and other taxing districts of the State for the year one thousand nine hundred and twenty, the machinery hereinafter set out is provided.

TAX RATES.

Assessment not to be used as basis of taxes until approved by General Assembly and revised by districts.

Sec. 3. The assessment made under the provisions of this act shall not be used as the basis for computation of taxes unless and until the same has been approved by the General Assembly and until the tax rates levied by the State have been revised by the General Assembly, and the tax rates levied by the counties, cities, towns and special tax districts of the State have been revised under rules to be laid down by the General Assembly, and such rates shall in all cases be so adjusted that an increase in revenue from the general property tax of not more than ten per cent shall be levied and collected in the year one thousand nine

Increase in general property tax for 1920 shall not exceed by more than ten per cent tax for 1919.

hundred and twenty than was levied and collected in the year one thousand nine hundred and nineteen in the State, and in all counties, cities, towns and special tax districts in the State. The rates so levied in one thousand nine hundred and twenty shall in all cases become the maximum rates that can be levied by the counties, cities, towns and special tax districts in any year thereafter until authority is given by the General Assembly to increase them: Provided, that fractions of cents may be disregarded in fixing the final modified rate of tax by the State, counties, municipalities and all other tax districts.

Rates levied in 1920 became maximum until increased by General Assembly.

Proviso: fractions of cents may be disregarded.

Sec. 4. *How property shall be valued.*

All property, real, personal and mixed shall be valued from best information obtainable according to its true value in money; that is to say at the price for which such property would sell for cash if voluntarily offered for sale by the owner thereof, and not at the price which might be realized if such property were sold at forced sale. In determining the value, the assessor shall consider as to each piece of property its advantage of location, buildings or other improvements, quality of soil, quantity of standing timber, water privileges, water-power, mines, minerals, quarries, or other valuable deposits known to be available therein, and their value.

Property to be valued according to worth in money.

Assessor to take into consideration location and natural resources.

Sec. 5. *Depreciation or appreciation.*

Depreciation to be considered, also appreciation from any factor.

In estimating the depreciation of any building, structure, machinery, or other class of property subject to depreciation, the appraiser shall also take into consideration any appreciation by reason of surroundings, increased cost of material and labor, and any other factors which would tend to increase or decrease the value of any such property. In considering the increased cost of material and labor these factors shall be considered upon the basis of such increase as may be deemed to be normal, or stable, and not such temporary increase as obtained during, or immediately on account of, war conditions, and in estimating the real value of land, it shall be with reference to the normal or stable value and not with reference to the temporarily inflated values, but in all cases the appraiser shall determine what is the actual fair market value of the property.

Appreciation from material or labor costs not to be computed on basis of war prices.

Normal or stable value basis of estimate on land.

Sec. 6. *Time when assessments shall be made.*

Real property valued as of May 1, 1919, and such valuations hold for 1920, 1921, 1922, and 1923.

All real property shall be valued as of the first day of May, one thousand nine hundred and nineteen, and when such valuation has been completed it shall become the value to be used for all tax purposes for the years one thousand nine hundred and twenty, one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-two and one thousand nine hundred and twenty-three. All personal

property shall be listed as of the first day of January in each year, and from and after the completion of the revaluation herein provided for all real property shall be listed as of January first of each year, and any revaluation on account of structures erected or destroyed shall be made as of that date.

Personal property listed as of January 1 of each year.

EXTRACTS FROM CHAPTER 92, PUBLIC LAWS OF NORTH CAROLINA, SESSION 1919.

An Act to Amend Chapter 231, Public Laws of 1917, in Relation to the Assessment of Property and the Collection of Taxes.

Sec. 8. The State Board of Tax Commissioners shall constitute a State Board of Equalization of valuations and taxes for the State. In case it shall appear or be made to appear to said board that any tax list in any county in the State is grossly irregular, unlawfully or unequally assessed, it shall be the duty of said board to equalize the valuations of real property among the several counties in the following manner:

Board to constitute State Board of Equalization. Grossly irregular lists corrected.

Sec. 61. *Railroads.*

The Commissioners selected from time to time under authority to establish the North Carolina State Tax Commission shall constitute a board of appraisers and assessors for railroad, canal, and steamboat companies and other companies exercising the right of eminent domain.

Assessment of railroad, canal, steamboat and other companies.

Reports of railroad, telegraph, telephone and other companies.

The president, secretary, superintendent, or other principal accounting officer within this State, of every railroad, telegraph, telephone, street railway company, whether incorporated by the laws of this State or not, shall, at such date as real estate is required to be assessed for taxation, return to the said Commission for assessment and taxation, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation within this State, viz:

Property to be returned.

The number of miles of such railroad lines in each county in this State and the total number of miles in this State, including the roadbed, right of way and superstructures thereon, main and sidetracks, depot buildings and depot grounds, section and tool houses, and the land upon which situated and necessary to their use; water stations and land, coal chutes and land, and real estate and personal property of every character necessary for the construction and successful operation of such railroad or used in the daily operation, whether situated on the charter right of way of the railroad or on additional land acquired for this purpose, except as provided below, including, also, if desired by the State Tax Commission, Pullman or sleeping cars or refrigerator cars owned by them or operated over their lines: Provided, however, that all machine and repair shops, general office buildings, storehouses and contents located outside of the right of way, and

Proviso: property listed for local taxation where situate.

also real and personal property, other than the property as returned above to the State Tax Commission, shall be listed for purposes of taxation by the principal officers or agents of such companies with the list takers of the county where the real and personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property. A list of such property shall be filed by such company with the State Tax Commission. It shall be the duty of the register of deeds, if requested so to do by the State Tax Commission, to certify and send to the said Commission a statement giving a description of the property mentioned in the foregoing proviso, and showing the assessed valuation thereof, which value shall be deducted from the total value of the property of such railroad company as arrived at by the Commission, in accordance with section sixty-six, before the apportionment is made to the counties and municipalities. The registers of deeds shall also certify to the Commission the local rate of taxation for county purposes as soon as the same shall be determined, and such other information obtained in the course of the performance of the duties of their office as the said Commission shall require of them; and the mayor of each city or town shall cause to be sent to the said Commission the local rate of taxation for municipal purposes.

List of property to be filed with State Tax Commission.

Certificate from register of deeds to Tax Commission.

Registers of deeds to certify local tax rate.

Mayor to send local tax rate.

Sec. 62a. *Railroad companies required to file maps, etc.*

Railroad company required to file map.

Every railroad company operating in this State shall be required to file with the State Tax Commission a map or blue print showing the location within the corporate limits of every incorporated city or town of its main line of road, and its length, together with location of its right of way, not exceeding one hundred feet in width, and the location and value of all real estate owned by any such company within the limits of any such city or town, and not included in the right of way so designated.

Location and value of real estate.

Every such company shall also report the value of any and all buildings and structures within the limits of any such city or town, whether on or off its right of way, and the commission shall find the value of all such real estate, buildings and structures and shall certify to such city or town the value of same, in addition to the value per mile of so much of its main line as may be located within such city or town, for ad valorem taxation.

Commission to certify property in city or town.

Sec. 63. *Railroads.*

Rolling stock defined.

The movable property belonging to a railroad company shall be denominated for the purpose of taxation "rolling stock." Every person, company, or corporation owning, constructing, or operating a railroad in this State shall, in the month of May, annually return a list or schedule to the State Tax Commission, which shall con-

Rolling stock to be returned.

tain a correct detailed inventory of all the rolling stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping cars and dining cars, express cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, hand cars, and all other kinds of cars, and the value thereof, and a statement or schedule, as follows: (1) The amount of capital stock authorized and the number of shares into which such capital stock is divided; (2) the amount of capital stock paid up; (3) the market value, or, if no market value, then the actual value of shares of stock; (4) the length of line operated in each county and total in the State; (5) the total assessed value of all tangible property in the State; (6) and, if desired, all the information heretofore required to be annually reported by section five thousand two hundred and ninety-one of the Revisal. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Commission, and with reference to amounts and value on the first day of May of the year of which the return is made.

Items of inventory.

Statement or schedule.

Instructions and forms.

Sec. 64. *Tangible and intangible property assessed separately.*

(a) At such dates as real estate is required to be assessed for taxation, the said Commission shall first determine the value of the tangible property of each division or branch of such railroad, or rolling stock

Valuation of tangible property.

Considerations determining value.

and all other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property.

Value for franchise.

(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds or any other securities, the value of which is based upon the earning capacity of the property.

Value of taxation.

(c) The aggregate value of the physical or tangible property and the franchise, as thus determined, shall be the true value of the property for the purpose of an ad valorem taxation, and shall be apportioned in the same proportion that the length of such road in each county bears to the entire length of such division or branch thereof; and the State Tax Commission shall certifiy, on or before the first day of September, to the chairman of the county commissioners and the mayor of each city or incorporated town the amount apportioned to his county, city or town; and the said Commission shall make and forward a like certificate to the Auditor of the State. All taxes due the State from any

Apportionment to counties.

Certificate to county.

Certificate to State Auditor.

Taxes payable direct to State Treasurer.

railroad company shall be paid by the treasurer of each company directly to the State Treasurer within thirty days after the first day of July of each year; and upon failure to pay the State Treasurer as aforesaid, he shall institute an action to enforce the same in the county of Wake or any other county in which such railroad is located, adding thereto twenty-five per centum of the tax. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county purposes.

Action to enforce payment.

Penalty.

Assessment by counties.

Sec. 65. *Railroads.*

When any railroad has part of its road in this State and part thereof in any other State, the said Commission shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the State Tax Commission of such company as provided in the next preceding section, and divide it in the proportion to the length such main line of road in this State bears to the whole length of such main line of road, and determine the value in this State accordingly: Provided, the Commission shall in valuing the fixed property in this State give due consideration to the character of road-bed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State

Proportionate assessment of railroad partly out of State.

Proviso: consideration of character of property or other factors.

than the average value for the entire system. On or after the first Monday in July the said Commission shall give a hearing to all the companies interested touching the valuation and assessment of their property. The said Commission may, if they see fit, require all argument and communications to be presented in writing.

Hearing to companies.

Sec. 98. *Taxes on railroads shall be a lien on property of the same.*

Lien for taxes on railroad property perpetual and paramount.

The taxes upon any and all railroads in this State, including road-bed, right of way, depots, sidetracks, ties and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the first day of May in each current year, against all claims or demands whatsoever of all persons or bodies corporate except the United States and this State; and the above described property or any part thereof may be taken and held for payment of all taxes assessed against said railroad company in the several counties of this State.

(Chapter 1, Public Laws, Extra Session, 1920)

EXTRACTS FROM AN ACT TO REVISE AND LIMIT TAX RATES FOR THE YEAR 1920 IN COMPLIANCE WITH PROVISIONS OF THE REVALUATION ACT; TO PROVIDE ADDITIONAL REVENUE FOR THE STATE FROM FRANCHISE AND LICENSE TAXES, AND FOR OTHER PURPOSES.

The General Assembly of North Carolina do enact:

Section 1. That the assessment or valuation of property made under the provisions of chapter eighty-four of the Pub-

lic Laws of one thousand nine hundred and nineteen is hereby approved by the General Assembly and adopted as the basis for the levy of tax rates by the State and by all subdivisions of the State for which taxes are levied for the year one thousand nine hundred and twenty, and the valuation of real property so fixed shall be adopted for the years one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-two, and one thousand nine hundred and twenty-three, except as such valuations may be hereafter changed according to law.

Sec. 2. That section two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen entitled "An Act to Raise Revenue" be repealed and the following substituted for section two of that act:

"Section 2. Poll and property tax.

"That no tax on property or polls shall be levied for the year one thousand nine hundred and twenty for the use of the State or for the State pension fund. There shall be levied and collected for the year one thousand nine hundred and twenty for the benefit of the State public school fund an ad valorem tax of thirteen cents on every one hundred dollars value of real and personal property in this State required to be listed by the revenue laws of the State and on each taxable poll or male between the age of twenty-one and fifty years, except the poor or infirm whom the county commissioners may declare and record fit subjects for exemption, there shall be levied and collected for the year one thousand nine hundred and twenty a tax of thirty-nine cents."

Sec. 3. That section three of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be repealed and designated as "obsolete."

Sec. 4. That the taxes levied in the foregoing section two shall be collected and paid into the State Treasury for the benefit of the public school fund in the manner provided by law for the collection and settlement of State taxes.

Sec. 5. That at any regular or called meeting of the boards

of county commissioners of the several counties of the State, or governing authorities of the municipalities of the State, or of any other body in which there is vested authority to levy tax rates, held after the ratification of this act, rates of tax for the year one thousand nine hundred and twenty may be levied under existing authority of law upon the following basis and subject to the following limitations:

There shall first be ascertained the taxable value upon which the tax rates were levied for such county, municipality or special tax district for the year one thousand nine hundred and nineteen, and the total amount of revenue produced by the rate of tax so levied in the year one thousand hundred and nineteen. An addition of ten per cent may be made to such total amount of revenue for such county, municipality or special tax district for the year one thousand nine hundred and nineteen, and the total amount of revenue thus ascertained shall be the maximum limit for which rates may be levied in the year one thousand nine hundred and twenty; that is to say that such rate may be calculated with relation to the total amount of taxable property listed for each such county, municipality or special tax district as will yield in revenue for the year one thousand nine hundred and twenty an amount not exceeding the revenue for the year one thousand nine hundred and nineteen plus ten per cent as ascertained in the manner herein provided. Any rate of tax levied by any tax levying authority of any county, municipality or special tax district for the year one thousand nine hundred and twenty in excess of the rate herein authorized shall be held to be an illegal rate of tax in so far as such levy may be in excess of the amount of levy herein authorized: Provided, fractions of cents may be disregarded in making such tax levy. * * *

Sec. 7. That for the purpose of providing additional revenue for the State in lieu of ad valorem tax on property heretofore levied by the State, the following taxes shall be levied

and collected in the manner now provided by law for collection of similar taxes:

Sec. 7a. Franchise tax on corporations.

That the franchise tax provided in section eighty-two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be amended by striking out section eighty-two (3) and of section eighty-two (8) the words "one twenty-fifth of one per cent" where they appear in said sections, and substituting in lieu thereof the words "one-tenth of one per cent," and by striking out of line twelve of section eighty-two (3) and line ten of section eighty-two (8) the word "five" and inserting in lieu thereof the word "ten."

Sec. 7b. That where a report required to be made by section eighty-two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen to the State Tax Commission by any domestic corporation shows capital stock issued and outstanding by any such company to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year one thousand nine hundred and twenty, or the report of any foreign corporation shows the proportion of the capital stock of that foreign corporation apportionable to this State under the rules laid down in section eighty-two of the Revenue Act to be less than half of the assessed value for taxation of all the property of such company in this State for the year one thousand nine hundred and twenty, the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation for the year one thousand nine hundred and twenty in this State. * * *

Sec. 7d. Privilege or franchise tax on railroads.

That section seventy-seven and seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be repealed and that section eighty-two (9) of chapter ninety of the Public Laws of one thousand nine hundred

and nineteen be amended by striking out of the third of the said subsection the word "railroad," that section eighty-two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be amended by inserting a new subsection to be designated as section eighty-two (6½) as follows:

"Section 82(6½). Railroads. Every railroad company doing business in this State shall on or before the first day of October, one thousand nine hundred and twenty, and on or before the thirtieth day of July annually thereafter, make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for ad valorem taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one (0.1%) per cent of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for on or before the first day of October, one thousand nine hundred and twenty, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State Auditor and Treasurer for collection. No county, city or town shall be allowed to collect any

taxes under this section. The tax imposed by this section shall be in addition to the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen, prior to the ratification of this act, only in so far as the tax imposed by this section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen, and if the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen for the year one thousand nine hundred and twenty have been paid by any railroad company such amount so paid shall be credited on the tax imposed by this section."

EXTRACTS FROM MACHINERY ACT OF NORTH CAROLINA:

Ch. 38, Public Laws 1921.

(Ratified March 8, 1921)

Sec. 28(a). *County boards to review valuation of real estate.*

County board of review.

The board of county commissioners and the county board of appraisers and review, heretofore appointed under chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen (any vacancy which may have occurred to be filled by appointment of the board of county commissioners), shall meet jointly in each county on the first Tuesday after the first Monday in April, one thousand nine hundred and twenty-one, as a county board of review, to determine if the value of real property as heretofore appraised and assessed in the

Day of meeting.

county as a whole is in excess of the fair value of such property at the time of meeting of such board. The chairman of the board of county commissioners shall be the chairman of the county board of review as thus constituted, and the clerk of the board of county commissioners shall be secretary of the said board. The said board shall make proper inquiry and investigation into the existing values of real property as compared with the assessed and appraised values thereof in the several cities, towns, and townships of the county; and if it shall find that the assessed value of such property is in excess of the actual value, it shall find the average percentage of such excess in the county as a whole, or in the several cities, towns, and townships, and shall report its finding so made to the State Tax Commission not later than the twentieth day of April, one thousand nine hundred and twenty-one. The values so reported shall be the values at which the property shall be assessed for taxation, unless and until the same have been changed and revised by the State Tax Commission and certified to the board of county commissioners of such county, which shall be done not later than the first day of July, one thousand nine hundred and twenty-one.

Organization of boards.

Inquiry and investigations as to values.

Findings.

Report to State Tax Commission.

Valuation.

Sec. 28(b). *Specific complaints.*

Specific complaints.

The board of county commissioners of the several counties shall have and exercise authority to hear and determine specific complaints of over-valuation or under-

valuation of any particular tracts of real property, and after the general equalization order provided for in the preceding subsection has been made, any person who owns property subject to taxation, and who finds that said property stands assessed for taxation, after such equalization order has been made, at an amount in excess of the actual value of such property on the first day of May, one thousand nine hundred and twenty-one, may have the right to have the same reassessed and reappraised by the said board, by filing with the clerk of the board of county commissioners, some time during the month of May, one thousand nine hundred and twenty-one, an application in form and substance as follows:

Application for reassessment.

Time for application.

To the Board of County Commissioners:

.....County.

Form of Application.

I hereby make application for the reassessment of the real property hereinafter described, for the reason that the said property is now assessed in excess of its actual value on the first day of May, one thousand nine hundred and twenty-one, and do hereby certify that in my best judgment the actual value of said property on that date was as it is stated herein to be:

Location .....

Condition .....

Acreage .....

Assessed value .....

Actual value May 1, 1921.....

.....

(Signature of Complainant.)

Complaint of under-valuation.

Review initiated by board.

Investigation of complaints.

Reports and recommendation.

Action by county commissioners.

Report to State Tax Commission.

General revision of values.

Any citizen of the county may file complaint of the under-valuation of any real property in the county, or the board may of its own motion revise the valuation of any property that it finds to be valued at more or less than the actual value of such property on the first day of May, one thousand nine hundred and twenty-one.

The county board of commissioners may appoint the county auditor or any resident freeholder of the county, who has general knowledge of the value of the real property of the county, to investigate any and all complaints filed under the provisions of this section, and make report and recommendations to the said board as to the true value in money of such properties. The county board of commissioners shall thereupon approve or revise such recommendations, and shall, not later than the fifteenth day of July, one thousand nine hundred and twenty-one, make report to the State Tax Commission of the increases and reductions in the valuation of specific properties made under authority of this section.

Sec. 28(c). If the board of county commissioners of any county, at their regular monthly meeting on the first Monday in April, one thousand nine hundred and twenty-one, shall be of the opinion that the valuation of real estate in such county is so unequal as between the owners of real property in such county as to require a more general revision of assessments than is practicable to be made under the provisions of subsections (a) and (b) of this

section, or the value of real property as heretofore appraised in such county as a whole is in excess of the present actual value of such property, it may by resolution so find and order that such revision be made. In the event such order is made, it shall be in lieu of the remedies provided in subsections (a) and (b) of this section, and the board of county commissioners shall appoint a board of review, composed of three resident freeholders, who have general knowledge of the value of real estate in such county, and such board of review may appoint such number of assistants as in their judgment is necessary to complete such revision, not later than the first day of July, one thousand nine hundred and twenty-one. The said board shall take and subscribe to an oath to perform their duties according to the provisions of this act according to the best of their ability, and shall give notice by public advertisement that the board, or one of its members or assistants, will attend at least one day in each township, and as long as shall be necessary to hear evidence as to the true value of the real property therein, and of any property over-valued or under-valued; and the said board shall proceed as speedily as possible to hear and determine what the present true value thereof is, and to make such general review and revision of the assessed value of real property in such county as it finds is necessary to be made, to the end that the same may be fairly and equally assessed at its present actual

Order in lieu of other remedies.

Board of review.

Assistants to board of review.

Board to be sworn.

Advertisement.

Determination of value.

Abstracts to county commissioners.

value in money. A complete abstract of such revised assessment, by townships, giving average value per acre, and value of town lots, and the value as a whole, shall be made to the board of county commissioners of such county and to the State Tax Commission, not later than the fifteenth day of July, one thousand nine hundred and twenty-one, and shall be subject to the authority of the State Tax Commission as a State Board of Equalization, so as to preserve a proper equalized value of real property in the several counties. The board of county commissioners shall fix the expense that may be incurred under this section, such expense to be borne by the county.

Authority of State Tax Commission.

Expense of review.

Basis for assessment of taxes.

Sec. 28(d). The report of the board of county commissioners, made pursuant to section twenty-eight (b), and the abstracts as reported by the board of review, under section twenty-eight (c), shall be the basis for the assessment of taxes, unless and until the same are changed by the State Tax Commission on or before the first day of September, one thousand nine hundred and twenty-one, and the said State Tax Commission shall, on or before the first day of September, one thousand nine hundred and twenty-one, certify down to the board of county commissioners of the several counties its findings and conclusions upon said report and abstracts.

State Tax Commission to certify findings.

Access to questionnaires and records.

Sec. 28(e). In any proceedings under this act the county board of review or county board of commissioners, or any of

their representatives, shall have access to the questionnaires filed by the owners of real property in the county under chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen, the tax rolls for the several townships and any other records pertaining thereto.

It shall be the duty of the State Tax Commission to exercise the authority of supervision herein imposed, to the end that, as nearly as may be, property of all classes in all counties of the State may be fairly and equally valued in accordance with the requirements of the Constitution and the provisions of this act, and if in any case in doubt as to whether changes in valuation in any county should be approved, it shall have the authority, and it shall be its duty, to make or cause to be made such investigation as it may deem necessary to determine the facts and reach a just conclusion.

State Tax Commission to exercise authority of supervision.

Investigation.

The words "actual value," as used in the several subdivisions of this section, shall be held to mean the true and actual value of the property if sold in the manner in which such property is usually sold, but not by forced sale thereof, and shall be held and deemed to mean what the property would bring at cash sale, when sold in such manner as such properties are usually sold.

"Actual value."

Sec. 28(f). Any taxpayer in any county may appeal, within thirty days, to the State Tax Commission from any finding by the board of county commissioners.

Appeal to State Tax Commission.

Sec. 28(g). Any taxpayer owning property assessed originally by the State Tax

Application for review by State Tax Commission.

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Commission may make application to the State Tax Commission for a review of the assessment of its property in the same manner herein provided for complaint by property owners before the county boards, and the State Tax Commission may hear and determine such complaints.

Hearing and determination.

Sec. 61. Same as Sec. 61 of Chapter 92 of the Public Laws of North Carolina, Session 1919.

Sec. 62. Same as Section 62 of Chap. 92 of the Public Laws of North Carolina, Session 1919.

Sec. 62a. Same as Sec. 62a of Chapter 92 of the Public Laws of North Carolina, Session 1919.

Sec. 63. Same as Sec. 63 of Chapter 92 of the Public Laws of North Carolina, Session 1919.

Sec. 64. Same as Sec. 64 of Chapter 92 of the Public Laws of North Carolina, Session 1919, except the last sentence which is as follows: The board of county Commissioners of each county through which said railroad passes shall assess againt the same only the tax imposed for county, township, or other taxing district purposes, the same as is levied on other property in such county, township, or special taxing districts.

Sec. 65. Same as Sec. 65 of Chapter 92 of the Public Laws of North Carolina, Session 1919.

Sec. 98. Same as Sec. 98 of Chapter 62 of the Public Laws of North Carolina, Session 1919.

EXTRACTS FROM REVENUE ACT OF NORTH CAROLINA:

Ch. 34, Public Laws 1921.

(Ratified March 8, 1921)

Sec. 3. *State taxes.*

No tax on property for State.

No tax on any property in the State shall be levied for any of the uses of the State Government. The taxes hereinafter levied in this act are for the expenses of the State Government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, an equalizing fund for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State Treasurer.

Tax for State expenses.

Appropriations.

SCHEDULE C

Sec. 76. *Defining taxes embraced in this schedule.*

Defining taxes embraced in schedule.

The taxes embraced in this schedule shall be listed and paid as specially herein provided, and shall be for the privilege of carrying on the business or doing the act named; and, if a corporation, shall be tax for the continuance of its corporate rights and privileges given under its charter, if incorporated in this State; or by reason of any act of domestication, if incorporated in another State, and shall be subject to other regulations mentioned in section twenty-six under schedule B.

Sec. 77. *Privilege tax on chair and sleeping cars.*

Chair and sleeping car companies to report receipts.

Every company operating chair cars and sleeping cars on which extra fare is charged shall make report to the State Auditor on or before the first day of October for the year one thousand nine hundred and twenty, and on or before the thirtieth day of July annually thereafter of the gross receipts collected from passengers transported between points in this State for the preceding year ending the thirtieth of June, which shall be verified by the oath of the secretary and treasurer of such company, and the said State Auditor shall certify said amount to the State Treasurer.

Verification.

License tax.

The annual license tax for operating such chair and sleeping cars within the State shall be three per cent (3%) of the gross earnings for the previous year. The tax imposed by this section shall be paid to the State Treasurer at the time of making the report provided for herein. No county, city or town shall impose any tax under this section.

Tax paid to Treasurer.

Sec. 78. *Obsolete.*

Sec. 79. *Privilege tax on express companies.*

Returns of express companies.

That every express company doing business in this State shall, on or before the thirtieth day of July in each year, make and return to the Corporation Commission a statement of the total number of miles of railroad lines over which such express com-

pany operates in this State; the said Corporation Commission shall certify the same to the State Treasurer as a basis for assessment and collection of the tax levied in the following schedule:

Sec. 79a. *Rate of taxation.*

Sec. 80. *Telegraph companies.*

Sec. 81. *Telephone companies.*

Sec. 82. *Franchise tax on corporations.*

Domestic corporations. Between the first day of May and the first day of July, one thousand nine hundred and thirteen, and annually thereafter during the month of May, each corporation organized under the laws of this State shall make a report in writing to the State Tax Commissioner in such form as the Commission may prescribe.

Domestic corporations to report annually.

Sec. 82(1). Such report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, or general manager of the corporation, and forwarded to the Commission.

Report to be verified.

Sec. 82(2). Such report shall contain—

Report to contain:

(a) The name of the corporation.

Name of corporation.

(b) The location of its principal office.

Principal office.

(c) The name of the president, secretary, treasurer, and members of the board of directors, with postoffice addresses of each.

Name and address of officers.

(d) The date of the annual election of officers.

Date of election.

(e) The amount of authorized capital

Amount of stock and par value of shares.

stock and the par value of each share.

Amount of stock subscribed, issued and outstanding, and paid up.

(f) The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

Nature and kind of business

Places of business.

(g) The nature and kind of business in which the corporation is engaged, and its place or places of business.

Changes since last report.

(h) The change or changes, if any, in the above particulars made since the last annual report.

Commission to determine subscribed or issued and outstanding stock.

Certificate to Auditor.

Sec. 82(3). Upon the filing of the report provided for in the last three preceding subsections, the Commission, after finding such report to be correct, shall, on or before the first Monday of August, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, or as soon thereafter as practicable, the Commission shall certify the amount so determined by it to the Auditor of the State, who shall charge for collection on or about August fifteenth, as herein provided, from such corporation, a fee of one-tenth of one per cent upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the Treasurer of the State on or before the first day of the following October. No county, city, or town shall have the power to levy any franchise tax under this section.

Fee charged for collection.

Minimum of fee.

Fee payable to Treasurer.

No county, city, or town tax.

Sec. 82(3½). That where a report required to be made under the provisions of this section to the State Tax Commission by any domestic corporation shows capital stock issued and outstanding by any such company to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which report is made, or the report of any foreign corporation shows the proportion of the capital stock of such foreign corporation apportionable to this State under the rules laid down in section 82 of this act to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which such report is made, the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation in this State.

Calculation of franchise tax when stock is less than one-half of value of property.

Sec. 82(4). *Foreign corporations.* Annually during the month of July, each foreign corporation doing business in this State, and owning or using a part or all of its capital or plant in this State, and subject to compliance with all other provisions of law, and in addition to all other statements, required by law, shall make a report in writing to the Commission in such form as the Commission may prescribe.

Reports from foreign corporations.

Sec. 82(5). Such report shall be signed

Verification of report.

and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, superintendent, or managing agent in this State and forward to the Commission.

Report to contain:

Sec. 82(6). Such report shall contain—

Name and domicile of corporation.

(a) The name of the corporation and under the laws of what State or county organized.

Principal office.

(b) The location of its principal office.

Name and address of officers.

(c) The names of the president, secretary, treasurer, and members of the board of directors, with the postoffice address of each.

Date of election.

(d) The date of the annual election of officers.

Amount of capital and par value of shares.

(e) The amount of authorized capital stock, and the par value of each share.

Amount of stock subscribed, issued, and paid up.

(f) The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

Nature of business and places of business.

(g) The nature and kind of business in which the company is engaged, and its place or places of business, both within and without the State.

Location of offices in this State and name and address of agent in charge.

(h) The name and location of its office or offices in this State, and the name and address of the officers or agents of the corporation in charge of its business in this State.

Value and location of property in this State and outside this State.

(i) The value of the property owned and used by the company in this State, where situated, and the value of the property owned and used out-

side of this State, and where situated.

(j) The volume of business done by the company in this State. **Volume of business in this State.**

(k) The volume of business done by the company outside of the State, and where the said business is done. **Volume of business outside of State.**

(l) The change or changes, if any, in the above particulars, made since the last annual report. **Changes since last report.**

Sec. 82(6½). *Railroads.* Every railroad company doing business in this State shall annually on or before the thirtieth day of July make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for ad valorem taxes. The franchise tax of each such railroad **Railroad companies to report annually.** **Commission to certify values to Auditor.** **Basis of calculation.** **Rate of franchise tax.**

company for the privilege of exercising its franchise in this State shall be one-tenth of one per cent (0.1%) of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State Auditor and Treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section.

When due.

Approximation if company delinquent.

No county, city, or town tax.

Commission to assess and fix proportion.

Sec. 82(7). Upon the filing of the report provided for in subsections four, five and six, the commission, from the facts thus reported, and any other facts coming to its knowledge bearing upon the question, shall, on or before the first Monday in September, assess and fix the proportion of the subscribed or issued and outstanding capital stock of the company represented by its property or business in this State, and certify the same to the Auditor of the State on or before the first Monday in October.

Certificate to Auditor.

Auditor to charge for collection.

Sec. 82(8). On or before October fifteenth the Auditor of State shall charge for collection, as herein provided, annually from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchise in this State, a fee of one-tenth of one per

cent upon the proportion of the subscribed or issued and outstanding capital stock of the corporation represented by property owned and used for or business transacted in this State as found and certified by the State Tax Commission, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the Treasurer of the State on or before the first day of the following December. No county, city or town shall have the power to levy any franchise tax under this section.

Minimum charge.

When fee payable.

No county, city, or town tax.

Sec. 82(9). That nothing in the nine preceding subsections of this act shall apply to banks, insurance companies, fraternal, beneficient associations, building and loan associations, express, telephone or telegraph companies, or other corporations, upon which a franchise tax may be levied in other sections of this act.

Companies elsewhere taxed.

Sec. 82(10). *General provisions.* Between the dates herein fixed for the determination of the amount of subscribed or issued and outstanding capital stock of a domestic corporation and the proportion of the authorized capital stock of a foreign corporation, represented by property owned and used or business transacted by it in this State, and the dates herein fixed for the certification to the Auditor of State of such amount or proportion, the commission may, on the application of any person or company interested, or on its own motion, review and correct its findings.

Correction of findings.

Sec. 82(11). Upon the payment of the tax or fee provided for in this act to the Treasurer of State, the Treasurer of State

Treasurer to give receipts.

shall make out and deliver to the public utility or corporation so paying a receipt for the payment by such public utility or corporation of the tax or fee herein provided for.

Lien for fees, taxes and penalties.

Sec. 82(12). The fees, taxes and penalties required to be paid by this act shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of the creditors and stockholders thereof.

Penalty for failure or neglect to report.

Sec. 82(13). *Penalties.* If a public utility or corporation required to file a report by any provision of this act fails or neglects to make such report as required herein, it shall be subject to a penalty of ten dollars per day for each day's omission after the time limited in this act for making such report.

Sec. 82(14). Obsolete.

Collection of taxes, fees, and penalties, by sheriff.

Sec. 82(15). Such taxes and fees and penalties thereon may be certified by the State Auditor to the sheriff of the county in which any such company has its home office, or of any county in which any such company may own property, for collection as provided in section four of this act, and

Action for recovery.

if collection is not made in this way such taxes or fees and penalties thereon may be recovered by an action in the name of the State, which may be brought in the

Venue.

Superior Court of Wake County, or in any county in which such corporation has

an office or place of business, or in which such public utility is doing business, or the line of any street, suburban, or interurban railroad company or railroad company is located, and such Superior Court shall have jurisdiction of such action regardless of the amount involved therein. The Attorney-General, on request of the State Treasurer, shall institute such action in the Superior Court of Wake County, or of any such counties as the State Treasurer may direct. In any such action it shall be sufficient to allege that the tax fee or penalty sought to be recovered stands charged on the delinquent duplicate of the Treasurer of State, and that the same has been unpaid for a period of thirty days after having been placed thereon.

Jurisdiction.

Attorney-General to institute action.

Sufficient allegations.

Sec. 82(16). All foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this State, and shall have no other or greater powers. Every contract made by or on behalf of any such foreign corporation, affecting the liability thereof, or relating to its property within this State, before it shall have complied with the provisions of section eleven hundred and ninety-four of the Revisal of one thousand nine hundred and five, shall be wholly void on its behalf and on behalf of its assigns; but shall be enforceable against it or them. Nothing contained in this sub-

Foreign corporations subject to liabilities and restrictions as home companies.

Contracts by or on behalf of foreign corporations.

Corporations.

section shall be held or construed to apply to insurance corporations, fraternal, beneficiary associations, or building and loan associations banking, railroad, express, telephone, and telegraph companies.

Delinquency of corporations certified to Secretary of State.

Sec. 82(17). If a corporation, wherever organized, required by the provisions of this act to file any report or return or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this State, or as a foreign corporation for profit doing business in this State and owning and using a part or all of its capital or plant in this State, or as a sleeping-car, freight line, or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the Commission shall certify such fact to the Secretary of State. The Secretary of State, shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this State by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation to do business in this State, by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporations by such articles of incorporation or by such certificate of authority shall cease and determine. The Secretary of State shall immediately notify such domestic or foreign corporations of the action taken by him.

Action by Secretary of State as to home companies.

As to foreign corporations.

Effect of action.

Secretary of State to notify corporations of action.

Sec. 82(18). Any person or persons who shall exercise, or attempt to exercise any powers, privileges, or franchises under the articles of incorporation or certificate of authority, after the same are canceled, as provided in any section of this act, shall be fined not less than one hundred dollars nor more than one thousand dollars.

Penalty for exercising corporate powers after action by Secretary of State.

* * * * *

Sec. 82(20). In addition to all other remedies for the collection of any taxes or fees due, under the provisions of this act, the Attorney General shall, upon request of the State Treasurer, whenever any taxes, fees, or penalties due under this act from any public utility or corporation shall have remained unpaid for a period of ninety days, or whenever any corporation or public utility has failed or neglected for ninety days to make or file any report or return required by this act, or to pay any penalty for failure to make or file such report or return, apply to the Superior Court of Wake County, or of any county in the State in which such public utility or corporation is located or has an office or place of business, for an injunction to restrain such public utility or corporation from the transaction of any business within this State until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the cost of such application, which shall be fixed by the Court. * * *

An Act to Transfer the Powers and Duties of the State Tax Commission to the State Department of Revenue.

Chap. 40, Public Laws 1921.

(Ratified March 8, 1921)

The General Assembly of North Carolina do enact:

Date for transfer.

Section 1. From and after the first day of May, one thousand nine hundred and twenty-one, all the powers and duties imposed by any act of law, including Revenue and Machinery Acts, exacted by the present session of the General Assembly, upon the State Tax Commission, shall be transferred to and imposed upon a department to be known as the State Department of Revenue, created by this act, to be administered by the Commissioner of Revenue, to be appointed as provided in this act. All such powers and duties, except as otherwise provided herein, shall devolve upon the Commissioner of Revenue, and wherever in the revenue laws of the State the words "State Tax Commission" are used such words shall, after May first, one thousand nine hundred and twenty-one, be held to mean Commissioner of Revenue, except as otherwise provided in this act.

Transfer of powers and duties.

State Department of Revenue.

Commissioner of Revenue.

Office created.

Sec. 2. There is hereby created the office of Commissioner of Revenue, to be appointed by the Governor, by and with the advice and consent of the Senate, and if such appointment is made when the Senate is not in session, confirmation may be by the Senate at the next session. The term of office shall be for four years from

Appointment.

Term of office.

and after the first day of May, one thousand nine hundred and twenty-one, and the succeeding commissioner of revenue shall be nominated and elected in the year one thousand nine hundred and twenty-four, in the manner provided for the nomination and election of other State officers, and quadrennially thereafter.

Election of successor.

Sec. 3. The powers and duties now exercised by the State Tax Commission as a State Board of Equalization, and the appellate authority exercised by the said State Tax Commission in determining appeals from valuations made by assessing officers in the several counties of the State, shall, from and after the first day of May, one thousand nine hundred and twenty-one, be held and exercised by a State Board of Equalization, composed of the Commissioner of Revenue, the chairman of the Corporation Commission, and the Attorney-General, who shall be ex officio member of and constitute the State Board of Equalization, to have and exercise the powers and duties now imposed by law upon the State Tax Commission as a State Board of Equalization, and as an appellate court, to hear and determine appeals from valuation of property by assessing officers in the several counties. The said board shall meet upon call of the Commissioner of Revenue as often as may be necessary to discharge the duties imposed by law upon the said board.

Powers and duties as of State Tax Commission.

Appellate authority.

State Board of Equalization.

Ex officio members.

Metings of board.

An Act to Refund Taxes Illegally Collected and Paid Into the State Treasury.

(Chapter 96, Laws of North Carolina, Extra Session 1921)

The General Assembly of North Carolina do enact:

Auditor to issue warrant.

Section 1. Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State Treasury in excess of the amount legally due the State, the State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney-General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: Provided, demand is made for the correction of such error or errors within two years from the time of such payment. Provided further, that claims which have arisen within the five years next preceding the ratification of this act shall be presented and made within two years from the ratification of this act.

Certificate of collection.

Approval of Attorney-General.

Proviso: time for demand.

Proviso. time for demand on existing claims.

Sec. 2. This act shall be in force and effect from and after its ratification.

Ratified this the 19th day of December, A. D. 1921.

An Act to Amend Chapter 34 of the Public Laws of 1921, Being an Act to Raise Revenue, Relative to Privilege Tax and to Income Tax on Railroads.

(Chapter 102, Laws of North Carolina, Extra Session 1921)

The General Assembly of North Carolina do enact:

Amendment to be section 78 of law.

Section 1. That chapter thirty-four, Public Laws of one thousand nine hundred and twenty-one, section seventy-eight, be and the same is hereby amended by striking out the word "obsolete" and by inserting the amended section hereinafter set forth in section two of this act.

Section amended and transposed.

Sec. 2. That chapter thirty-four, Public Laws of one thousand nine hundred and twenty-one, section eighty-two, subsection six and one-half (6½), be and the same is hereby amended so as to read as hereinafter set forth in this section, and as so amended the said subsection six and one-half be and it is hereby transposed from the said section eighty-two to section seventy-eight of the said chapter, to stand as section seventy-eight of the said chapter, and to read as follows, to-wit:

Privilege tax on railroads.

PRIVILEGE TAX ON RAILROADS.

Reports required.

Every railroad company doing business in this State shall annually, on or before the thirtieth day of July, make and return to the Commissioner of Revenue, in such form and upon such blanks as shall be required and furnished by him, and giving such information as he shall require for the purpose of carrying out the provisions of this section, a report upon which the

Ascertainment and certificate of value.

Commissioner of Revenue shall ascertain and certify to the State Auditor the value upon which the amount of tax to be paid by any such railroad as a license or privilege tax shall be calculated. The value upon which such calculation shall be made by the State Auditor, and the measure of the extent to which every such railroad company is carrying on intrastate commerce within the State of North Carolina, shall be the value of the total property, tangible and intangible, in this State, of each such railroad company as assessed for ad valorem taxation for the year in which such report is made. The tax which every railroad company shall pay for the privilege of carrying on intrastate commerce within this State shall be one-tenth of one per cent of the value so ascertained and certified by the Commissioner of Revenue, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for it shall be the duty of the Commissioner of Revenue to make an approximation from the reports and records on file in the State Department of Revenue of the value upon which the amount of tax due by the said company under this section shall be calculated, and to certify the said value to the State Auditor. Upon that value the State Auditor shall then calculate the amount of the said tax, as hereinbefore provided, and shall certify the same to the State Treasurer for collection. No county, city, or town shall be allowed to

Basis of valuation.

Rate of tax.

When tax payable.

Ascertainment of value on failure to report.

Calculation.

Municipalities not allowed to colect tax.

collect any taxes under this section: Provided, that it is the intention of this section to levy upon railroads a license or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within the State of North Carolina and not a part of interstate or foreign commerce; that the tax provided for in this section is not intended to be a tax on the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State.

Proviso: tax limited to intrastate privilege.

Interstate commerce exempt.

Sec. 3. That chapter thirty-four, Public Laws of one thousand nine hundred and twenty-one, section eighty-two, subsection nine (9), be and the same is hereby amended by inserting the word "railroads" in line two thereof between the words "to" and "banks."

Railroads elsewhere taxed.

Ratified this the 19th day of December, A. D. 1921.